Circuit Court for Washington County
Case Nos. C-21-CR-18-000738 & C-21-CR-18-000767

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 761 & 769

September Term, 2020

MATTHEW BISER, JR.

v.

STATE OF MARYLAND

Fader, C.J.,
Berger,
Raker, J.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: April 4, 2022

Appellant Matthew Biser Jr. was convicted in the Circuit Court for Washington County of four counts of Sexual Offense in the Third Degree, four counts of Contributing to Conditions that Render a Child in Need of Supervision, one count of Soliciting a Minor to Engage in a Third-Degree Sexual Offense, three counts of Inducing a Minor to a Certain Place for Prostitution, two counts of Sexual Abuse of a Minor, and one count of Furnishing Alcohol to a Minor. He presents the following questions for our review:

> "1. Did the trial court err by precluding the defense from calling Ian Ferguson and Steven Rhyne as witnesses?
>
> 2. Did the trial court err in limiting the defense's cross-examination of A?
>
> 3. Did the trial court err in imposing separate sentences for sexual solicitation of a minor to engage in a third degree sexual offense and the third degree sexual offense?"

We shall hold that the trial court erred in excluding the witnesses in the motion *in limine*, but that the error was harmless error, that the trial court did not err in limiting the defense's cross-examination of A, and that the trial court did not err in failing to merge the sentences. Accordingly, we shall affirm.

I. Background and Facts

Appellant was indicted by the Grand Jury for Washington County. He was convicted by a jury as detailed above. The circuit court imposed a total term of incarceration of 142 years, eighty-two suspended.[1]

This appeal arises from the trial court's rulings to exclude two of appellant's witnesses from testifying as proffered impeachment witnesses and to limit appellant's cross-examination of one of the state's complaining witness. Appellant additionally contends that the trial court erred in imposing separate sentences for his solicitation charges.

The State charged appellant with illegal sexual activity with four minor females, designated as "A," "H," "L," and "T," all about fourteen to sixteen years of age. Each child testified at trial. Appellant's defense was that the events did not happen and that any reports to the contrary, by any of these minors, were fabrications. To attack the State's primary witness A's, credibility, the defense wanted to call two witnesses: Mr. Ferguson and Mr. Rhyne. Defense counsel did not disclose their names to the State until a few days before trial. The State filed a motion *in limine* to exclude them from testifying because appellant

[1] The court imposed the following sentences: two consecutive terms of twenty-five years for Sexual Abuse of a Minor; ten years, consecutive, for Third-Degree Sexual Offense; one term of ten years, consecutive and suspended, for Third-Degree Sexual Offense; ten years, consecutive and suspended, for Inducing a Minor to a Certain Place for Prostitution, two terms of ten years, concurrent and suspended, for Inducing a Minor to a Certain Place for Prostitution; ten years, consecutive and suspended; for Soliciting a Minor to Engage in a Third-Degree Sexual Offense; four concurrent and suspended terms of three years for Contributing to Conditions that Render a Child in Need of Supervision; and a $100 fine for Furnishing Alcohol to a Minor.

failed to timely disclose these witnesses as required by Rule 4-263(h)(2). The court granted the State's motion, and the witnesses did not testify at trial. The trial court also restricted appellant's cross-examination of A, which prevented appellant from questioning her about prior sexual assault accusations she may have made.

We set out the following facts as background. On January 13, 2018, H, a then-eighth-grade student, introduced her schoolmate, A, to appellant at a music concert, which was also attended by H's sister, L, and another friend, "T."[2] After the concert, appellant drove A, H, L, and T to his home, and he provided them all with alcohol and edible marijuana. A became drunk. Everyone got into appellant's hot tub, appellant put his fingers in A's vagina and appellant had her perform oral sex on him. In A's description of the incident, she noted that appellant "put his hand on the top of [her] head," pushed her down "towards his dick," and made her "go back and forth."

Approximately one week later, another incident occurred in appellant's bedroom with L, H, and A. L and H performed oral sex on appellant while appellant made out with and digitally penetrated A. About a month after this incident, A received $200 from appellant. In a third incident, A performed oral sex on appellant, and appellant paid H and L $100 for A's having done so. Around April 2018, L, H, and A went to appellant's home with another friend, E, and A and L both performed oral sex on appellant while H and E made out with each other.

[2] H knew appellant through her sister L, who introduced H to appellant after she met him through her former friend, "C," appellant's neighbor.

On June 15, 2018, A was interviewed by a Washington County Child Advocacy Center investigator about these incidents. The investigator called in H, L, T, and appellant to question them about the incidents. In these interviews, H recounted that she gave appellant a "hand job" twice and that appellant gave her $100 in exchange.

Appellant was arrested and charged with twenty-seven counts related to Third-Degree Sexual Offense, Solicitation, Furnishing Alcohol to a Minor, Contributing to Conditions that Render a Child in Need of Supervision, Inducing a Minor to a Certain Place for Prostitution, Sexual Abuse of a Minor, and Displaying Obscene Material to a Minor, each of which attributed separately to A, H, L, and E. Appellant was convicted on four counts of Sexual Offense in the Third Degree, four counts of Contributing to Conditions that Render a Child in Need of Supervision, one count of Soliciting a Minor to Engage in a Third-Degree Sexual Offense, three counts of Inducing a Minor to a Certain Place for Prostitution, two counts of Sexual Abuse of a Minor, and one count of Furnishing Alcohol to a Minor.

After the opening statements at trial, the State moved *in limine* to exclude defense witnesses Mr. Ferguson and Mr. Rhyne on the grounds that the defense failed to disclose them as required by Rule 4-263. Defense counsel argued that Mr. Ferguson and Mr. Rhyne did not need to be disclosed because they were impeachment witnesses who would only be called to impeach A's credibility with prior false accusations of sexual misconduct made by her and to establish "her propensity to tell a lie." Defense counsel also stated that they wanted to ask whether the witness "carried a knife down the street and went after one of

these witnesses, who [was] breaking up with her." Defense counsel argued, in pertinent part, as follows:

> "With regard to—in the sense that a rape allegation that they have had against them with the same factual scenario, if she denies it, if she denies the fact that she carried a knife down the street and went after one of these witnesses, who is breaking up with her, we would ask her, 'Is that true?' She will say, 'No, it is not true.' We then will produce at least one, if not two witness, Ferguson and Rhyne, to say that, 'Yes this occurred,' period."

Defense counsel also refuted the State's notion that the defense was "hiding witnesses," arguing that they had obtained the names and addresses of Mr. Ferguson and Mr. Rhyne from the State itself. The court rejected this argument, stating that "[t]he fact that the State provided information with regard to these people doesn't mean that it's going to be presented as evidence here."

The court granted the State's motion *in limine* to exclude the testimony of Mr. Ferguson and Mr. Rhyne, agreeing with the State's argument that allowing their testimony was a discovery violation under Rule 4-263(h)(2). In so ruling, the court stated that the inclusion of their testimony "feels like trial by ambush" because the court did not find any explanation as to why they were not initially disclosed as witnesses and were now being presented "the Friday before a five-day trial that starts Monday." The court excluded the witnesses as a sanction for this discovery rule violation.

Before the State presented A as its first witness, the prosecutor asked the court to rule on whether on cross examination counsel could inquire into "completely unrelated other instances where [A] may have been a victim." Defendant argued that he was entitled

to inquire whether A had a "consistent pattern" of "making the same allegation against people she knew." Defendant also argued that the proffered cross-examination would not implicate the Rape Shield Law because it was intended to get "into her past statements," not "her sexual past." The court permitted defendant to conduct a limited cross-examination to the extent of asking whether A had made any prior accusations against others, ruling as follows:

> "[C]ollateral evidence rule is going to—to pro- prohibit other evidence from coming in to—to contradict her. So defense is stuck with whatever answer she gives. And as to specific questions that are aimed to go into any—any of her sexual history outside of any contacts she may have had with Mr. Biser, I think is covered under—under rape shield. I think that's—I feel that's what that statute is—is there for. That we don't—if she's maintaining that those other assaults occurred, regardless of what [Department of Social Services] thought, regardless of what the accused says, the accused has a pretty good motive to deny it, it would be done to—I understand the defense's point that it—they want to get at her credibility, but I don't—I'm not going to allow it just specifically as to that."

Upon conclusion of the trial, appellant was convicted and sentenced as above. This timely appeal followed.

II. Exclusion of Witnesses

Appellant presents three issues for our review: two issues related to the trial court's evidentiary and discovery violation rulings and one issue related to the sentence imposed by the court.

As to the exclusion of Mr. Ferguson and Mr. Rhyne, appellant argues that the trial court erred in excluding the witnesses prematurely from testifying because the two witnesses were impeachment witnesses and did not need to be disclosed to the State under Rule 4-263 until after the State's witness had testified. Therefore, appellant concludes, there was no discovery violation, and the court should not have excluded the witnesses as a discovery violation sanction. Appellant argues that the court denied him the constitutional right to present a defense. In addition, appellant argues that, assuming a discovery violation, the court abused its discretion in failing to consider a lesser sanction than exclusion of the witness and in failing to consider the five factors set forth in *Taliaferro v. State*, 295 Md. 376, 390-91 (1983).

The State analyzes the exclusion of the two witnesses separately, but it maintains that the trial court excluded properly both witnesses. First, the defense violated the discovery rules and obligations in disclosing Mr. Ferguson as a witness only a few days before trial. In the State's view, defense counsel's attempt to shoehorn these witnesses into the rule exception as impeachment witnesses fails because witnesses are excluded from the disclosure requirement only if the witnesses are called for the *sole and unequivocal* purpose of impeaching a witness. The State maintains that defense counsel never said the sole purpose for calling Mr. Ferguson was impeachment, that the language defense counsel used was not unequivocal (meaning that the witnesses were not strictly impeachment witnesses), and that the witnesses would be providing general factual testimony. The State relies on an analogy to *Wright v. State*, 474 Md. 467 (2021). To argue that the statements appellant's

defense attorneys made were equivocal, the State points specifically to two quotes from the attorneys' proffers. First, the State points to defense counsel's remark that witnesses Mr. Rhyne and Mr. Ferguson were "*essentially* rebuttal and impeachment-type witnesses." The State focusses on the word "essentially" and argues it makes the statement equivocal. Second, the State points to defense counsel saying: "[b]ut if it were rebuttal or impeachment, my understanding of the rule is we didn't have to disclose." The State zeroes in on the phrase "if it were" and argues that it makes that statement equivocal.

In response to appellant's argument that, even if there was a discovery violation, the sanction was error because it was too harsh, first, the State argues appellant's proposed alternate sanction (ordering the defense to make Mr. Ferguson available to the State the following morning) was not a possibility because (a) trial had started, (b) the prosecutors did not have time to interview witnesses, and (c) it is not a sanction circuit court judges may impose. Second, the State argues that circuit court judges do enjoy very broad discretion to exclude witnesses upon finding a discovery violation. Third, the State argues that appellant's *Taliaferro* factors argument is meritless because the court considered the factors and, in any case, that that argument is unpreserved because there was no objection below.

As to witness Mr. Rhyne, the State says that the trial court was correct; appellant's defense attorneys proffered other purposes, besides impeachment, for calling Mr. Rhyne.

Finally, with respect to both witnesses Mr. Ferguson and Mr. Rhyne, the State argues that even assuming *arguendo* that the circuit court erred in its application of Rule

4-263, that error was harmless because the appellant cannot show prejudice. In the State's view, the proffered testimony was not relevant and was cumulative because "the jury heard from two [other] witnesses who said that A. is a liar." The State argues the error was harmless because Mr. Ferguson's testimony would have been otherwise inadmissible. First, it would have been irrelevant. Second, it would have been inadmissible because "[i]f Biser wanted to offer character evidence, he would not have been able to elicit specific instances." Third, it would have been otherwise inadmissible under Maryland's Rape Shield Law.

We turn first to appellant's argument that the circuit court committed reversible error by excluding the witnesses from testifying because they were not disclosed timely. We hold that the trial court erred in excluding the witnesses because they were proffered as impeachment witnesses and therefore need not have been disclosed prior to trial. The error, however, was harmless beyond a reasonable doubt. The error could not have contributed to the guilty verdicts because, even if defense counsel had been permitted to call either witness, the testimony of neither witness was relevant and hence was not admissible evidence.

Rule 4-263(e) addresses the discovery obligations of a defendant to the State and provides, in pertinent part, as follows:

> "(e) Disclosure by Defense. Without the necessity of a request, the defense shall provide to the State's Attorney:
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> > (1) Defense Witness. The name and, except when the witness declines permission, the address of each defense witness other than the defendant, together with

> all written statements of each such witness that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial."

Sanctions for discovery violations are set out in Rule 4-263(n). The Rule gives very broad discretion to the trial judge to fashion an appropriate remedy, stating as follows:

> "(n) Sanctions. If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court."

We review the question of whether a discovery violation has occurred *de novo*. *Cole v. State*, 378 Md. 42, 56 (2003). Ordinarily, we review the sanction imposed for an abuse of discretion. *Morton v. State*, 200 Md. App. 529, 542 (2011) (quoting *Rodriguez v. Clarke*, 400 Md. 39, 57 (2007)). The remedy for a violation of the discovery rules is within the sound discretion of the trial judge. *See State v. Graham*, 233 Md. App. 439, 457 (2017). When deciding the sanction to impose, if any, the trial court should consider the following factors: "(1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas v. State*, 397 Md. 557,

570-71 (footnote omitted). The purposes of the discovery rules are to prevent a defendant from being surprised at trial, to give a defendant sufficient time to prepare a defense, and to force a defendant to file timely motions to suppress evidence. *Id.* at 567. The general view is that the court should impose the least severe sanction consistent with the purposes of the rule. *Id.* at 571. Violation of the discovery rules is subject to harmless error analysis. *See Pantazes v. State*, 141 Md. App. 422, 441 (2001).

Exclusion of testimony for a discovery violation is considered an extreme sanction and should be imposed after all other sanctions have been exhausted. *Thomas*, 397 Md. at 572. Exclusion should not be imposed, ordinarily, absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial. *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002); *Overton v. State*, 195 So. 3d 715, 718 (Miss. 2016); *People v. Jordan*, 133 Cal. Rptr. 2d 434, 440 (Cal. Ct. App., 2d Dist., Div. 3 2003); *Allen v. State*, 944 P.2d 934, 937 (Okla. Crim. App. 1997); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, Standard 11-7.1, Commentary, p. 114 (3d ed. 1996)).

At issue in this case is the exception in Rule 4-263(e)(1) to the pre-trial disclosure requirement of the witnesses' names. The Rule provides that the "[d]isclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial." *Id.* Appellant argued before the circuit court, and argues before this Court, that witnesses Mr. Rhyne and Mr. Ferguson both met the impeachment witness exception.

In determining whether the trial court abused its discretion in imposing a sanction for a discovery violation, we must first determine whether a discovery violation occurred.

As to Mr. Ferguson, appellant argues the trial court erred in finding a discovery violation because Mr. Ferguson was an impeachment witness not subject to the disclosure rule of 4-263(e)(1).[3] The trial court excluded Mr. Ferguson because "it feels like trial by ambush." The court ruled as follows:

[3] Appellant's trial counsel proffered Mr. Rhyne and Mr. Ferguson's testimony to the trial court, stating as follows:

> "One, Ian Ferguson is being brought in for several impeachment issues including results that he has personally experienced, situations that he has personally experienced with A. Okay? He personally will testify, I will ask her a question. She, we assume, is gonna deny it. We will then offer for impeachment. I don't know where this trial within a trial is if the woman is sitting up there lying. As to Mr. Rhyne, we think it's relevant that while A was allegedly involved with Mr. Biser, Mr. Rhyne, who had already graduated from North High School, and she was at Boonsboro Middle School, her parents allowed him to live with them and with her. Yes, I believe that a jury is entitled to know the full facts of a family situation particularly when you have all of these reports in here.
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> But we think that A has a true propensity for not telling the truth. It's got nothing to do with a trial within a trial. But it has everything to do with the fact that she has said to people flat out, Your Honor, she has said to people that, 'If you break up with me, I am going to accuse you of rape.' She has flat out said that. I don't know where a trial within a trial comes. But I think that is classic impeachment assuming, as I believe, she's gonna deny ever saying that.
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> With regard to—in the sense that a rape allegation that they have had against them with the same factual scenario, if she denies it, if she denies the fact that she carried a knife down the street and went after one of these witnesses, who is breaking up with her, we would ask her, 'Is that true?' She will say, 'No, it is not true.' We will produce at least one, if not two witnesses, Ferguson and Rhyne, [footnote continued . . .]

> "The point is this case has been pending for a long time. And as to Mr. Ferguson, that feels like trial by ambush. I'm—no explanation has been given. I haven't heard anything as to why Mr. Ferguson is not disclosed until the Friday before a five-day trial that starts Monday. So the motion *in limine*, or in the alternative, sanction for the discovery violation is Mr. Ferguson will not be participating in this case."

Although the court engaged in a colloquy regarding relevancy of Mr. Ferguson's testimony prior to ruling, the court focused primarily on the *time* the witness was disclosed to the State. We see no analysis, by the court, of a lesser sanction to exclusion and of the prejudice to the parties.

The court erred in finding that appellant violated the discovery rules with respect to Mr. Ferguson. We reject the State's argument that the trial court found a discovery violation properly because the defense was not offering the witnesses for the "sole purpose of impeaching a State's witness," nor was defense counsel's statement equivocal. The State is splitting hairs; Mr. Ferguson was to be called for impeachment purposes and he should not have been excluded (if indeed exclusion was a proper sanction) before the State's witness testified. The State's reliance on *Wright* is misplaced. *Wright* dealt with

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> to say that, 'Yes, this occurred,' period.
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> All they have to say is 'Mr. Ferguson, were you threatened by A?' 'Yes.' 'What did she say?' 'She said that, 'if you break up with me, I'm gonna call and complain that you raped me.' Okay? That's it.
>
> ***
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> That will happen if and when Ferguson gets on the—if—look, this is all based on whether or not [A] is going to say that she—she threatened someone with this . . . . She pulled a knife on someone with this."

the propriety of a jury instruction as to the relevance of evidence of "flight." *Wright*, 474 Md. at 472. That case has no bearing on the issues before us in this case.

As to Mr. Rhyne, the analysis is a little less clear. Arguably, Mr. Rhyne does not fit into the impeachment witness exception to the Rule because the defense was not calling him for the sole purpose of impeachment. Defense counsel proffered that witness A's parents, while witness A was allegedly involved with appellant, Mr. Rhyne, who had graduated from high school, and while she was in middle school, allowed him to live with them and her. Counsel argued that the jury was entitled to know the full facts of a family situation. We are unable to see how Mr. Rhyne's testimony impeaches the witness or how his testimony would have been admissible. Any error, again, is harmless error because Mr. Rhyne's testimony was neither relevant nor admissible.

The harmless error test is well established in Maryland, and most often quoted from the articulation of the standard in *Dorsey v. State*:

> "[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of-whether erroneously admitted or excluded-may have contributed to the rendition of the guilty verdict."

276 Md. 638, 659 (1976) (footnote omitted).

As noted above, the error was harmless. Appellant's proffer and argument is that Mr. Ferguson and Mr. Rhyne would have impeached witness A that she had never

threatened anyone else, if they broke up with her, that she would accuse them of rape. Although the trial judge did not place her ruling upon the ultimate admissibility of this testimony, it is clear that the trial judge was troubled with the admissibility and relevancy of this line of inquiry, as are we. In other words, their testimony would have been relevant as impeachment *only* if appellant would first have been permitted to question whether A had ever: (1) threatened to accuse someone of rape if they broke up with her; or (2) came at someone with a knife on the street. As the Court of Appeals has stated,

> "[A] witness may be cross-examined on matters which test his credibility . . . one qualification or exception to the rule is that a witness may not be impeached by showing he has made statements which contradict his testimony on collateral or irrelevant issues."

Howard v. State, 234 Md. 410, 415 (1964) (internal citations omitted). "[A]n item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, *i.e.*, one that is properly provable in the case." *Harris v. State*, 242 Md. App. 655, 664 (2019). Since those questions of A would have been excluded properly on relevancy grounds, there would not have been any testimony of A to impeach with the proffered testimony of Ferguson and Rhyne. Witness A and appellant were never in a romantic relationship. Appellant's proffer did not suggest that A actually falsely accused this other individual of rape—only that she threatened to do so. Because the proposed questions were objectionable, a State's objection would have been sustained properly by the court as irrelevant, and there would have been nothing for appellant to impeach. *Howard*, 234 Md. at 415. The proffered evidence would not have

been admissible impeachment evidence. Therefore, the trial court's error, if truly error, in, at the motion *in limine* stage, excluding the witness from testifying at the trial was harmless beyond a reasonable doubt.

III. Scope of Cross-Examination

We turn to the circuit court's ruling curtailing appellant's cross-examination of witness A. The standard of review is abuse of discretion. *See Pantazes*, 376 Md. at 681.

Witness A was the State's first witness. Before she testified, the State requested the court to rule on whether the defense could cross-examine her regarding "unrelated other instances where she may have been a victim" and where, arguably, she falsely accused other persons. The trial court ruled that defense counsel could ask A if she had ever accused someone else of sexual improprieties. But the trial court ruled also that the defense was bound by the answer, and in essence, could not impeach her with extrinsic evidence. The record shows that, in this regard, A was cross-examined as follows:

> "[DEFENSE COUNSEL]: In a very general sense, have you ever made allegations against others concerning sexual improprieties up through and including rape?
>
> [WITNESS]: No.
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> [DEFENSE COUNSEL]: You have never ever reported anyone?
>
> [WITNESS]: Oh, yes, I have. I'm sorry. I didn't understand your question.
>
> [DEFENSE COUNSEL]: Okay.

[WITNESS]: Yes, I have.

[DEFENSE COUNSEL]: Okay, so you have accused others?

[WITNESS]: I haven't accused others, no.

[DEFENSE COUNSEL]: Then I'm confused as to what you said.

[WITNESS]: Can you . . . okay, I'm sorry. Can you repeat the question and dumb . . . .

[DEFENSE COUNSEL]: Sure

[WITNESS]: . . . it a little? I'm sorry.

[DEFENSE COUNSEL]: All right, not a problem. Have you in the past made allegations about someone's sexual improprieties with you up through and including rape?

[WITNESS]: Yes.

[DEFENSE COUNSEL]: Yes? You have . . . .

[WITNESS:] Yes.

[DEFENSE COUNSEL]: made others?

[WITNESS]: Yes.

[DEFENSE COUNSEL]: So this is not your first.

[WITNESS]: This is not my first. But it didn't . . . the first one did not go to trial."

Appellant argues that an adequate cross-examination would have revealed if A had made statements to the police, the State's Attorney, or DSS falsely accusing others of sexual misconduct.

The State argues that there was no error here in that defense counsel asked the witness about prior claims and she answered "yes." Unclear to the State as to appellant's complaint, the State interprets appellant's claim as to a deprivation of impeaching credibility with prior *false accusations of sexual misconduct*. The State points out that appellant presented no evidence that any of the persons accused would deny the claims, except that they did not proceed to trial. Most importantly, the State points out that, under Maryland evidence law and *Cox v. State*, 298 Md. 173, 179 (1983), even if witness A had denied making false claims, appellant would not have been able to introduce extrinsic evidence to contradict or impeach her. In other words, the cross-examiner would be bound by the witness's answer, and, if the witness had denied the accusation, the cross-examiner would not be permitted to introduce extrinsic evidence to contradict the witness.

We hold that the trial court did not abuse its discretion in limiting the scope of the cross-examination of witness A. "The Confrontation Clause of the Sixth Amendment to 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 or her." *Pantazes*, 376 Md. at 680 (citations omitted). The ability to cross-examine witnesses is neither boundless nor unrestricted and is subject to reasonable limits. *Martinez v. State*, 416 Md. 418, 428 (2010); Rule 5-611(a).[4]

[4] Rule 5-611(a) provides as follows:

> "(a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective [footnote continued . . .]

As this court has noted:

> "The exercise of a judge's discretion is presumed to be correct, he [or she] is presumed to know the law, and is presumed to have performed his duties properly. Absent an indication from the record that the trial judge misapplied or misstated the applicable legal principles, the presumption is sufficient for us to find no abuse of discretion. Additionally, a trial judge's failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion."

Cobrand v. Adventist Healthcare, Inc., 149 Md. App. 431, 445 (2003) (Internal citations and quotation marks omitted).

The trial judge's decision restricting appellant's ability to cross-examine A was actually a combination of two decisions. The trial judge stated:

> "[C]ollateral evidence rule is going to—to prohibit other evidence from coming in to contradict her. So defense is stuck with whatever answer she gives. And as to specific questions that are aimed to go into any of her sexual history outside of any contacts she may have had with Mr. Biser, I think is covered under rape shield."

Appellant challenges the judge's rape shield ruling. Maryland's rape shield law states, in pertinent part, as follows:

> "(a) Evidence relating to a victim's reputation for chastity or abstinence and opinion evidence relating to a victim's chastity or abstinence may not be admitted in a prosecution for:
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> (1) a crime specified under this subtitle or a lesser included crime;

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for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

> (2) the sexual abuse of a minor under § 3-602 of this title or a lesser included crime; or
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> (3) the sexual abuse of a vulnerable adult under § 3-604 of this title or a lesser included crime.
>
> (b) Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution described in subsection (a) of this section only if the judge finds that:
>
> (1) the evidence is relevant;
>
> (2) the evidence is material to a fact in issue in the case;
>
> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
>
> (4) the evidence:
>
> (i) is of the victim's past sexual conduct with the defendant;
>
> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
>
> (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or
>
> (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue."

Md. Code (2002, 2012 Repl. Vol.), § 3-319 of the Criminal Law Article ("Crim. Law"). Appellant was prosecuted for violating (among other criminal statutes) Crim. Law § 3-307, third-degree sexual offense statute. Thus, under the rape shield statute, "[e]vidence of a specific instance of [A]'s prior sexual conduct" would be admissible only if, among other

requirements, it was evidence "of the victim's past sexual conduct with the" appellant. Crim. Law § 3-319(b)(4)(i). That is exactly what the trial judge ruled, stating that "specific questions that are aimed to go into any—any of her sexual history outside of any contacts she may have had with Mr. Biser, I think is covered under rape shield."

IV. Sentencing

Appellant argues that the trial court erred in imposing separate sentences for solicitation and third-degree sexual offense and that the solicitation offense should have merged into one of the three third-degree sexual offense counts that alleged fellatio. He argues that merger is appropriate based upon the rule of lenity and fundamental fairness. Appellant argues that the relevant inquiry with regard to the rule of lenity is whether the two offenses are of necessity closely intertwined or whether one offense is necessarily the overt act of the other. Here, he maintains that the charges arose out of the same act or transaction. Appellant highlights the following part of the prosecutor's closing argument:

> "So in relation to the sexual solicitation of a minor, sexual solicitation, command, authorize, urge, entice, request. What did [A] say? He pushed her head down. Not he forced her head down, not he shoved her head down. He just kind of, I believe in her CAC interview she said that they were making out, and he just kind of pushed her head down urging her to go lower, where she placed his penis in her mouth."

The State argues that the issue of merger under fundamental fairness is not preserved for our consideration because appellant never argued that basis at sentencing. Appellant counters that while he did not argue fundamental fairness at sentencing, he did argue

merger at the motion for judgment, stating that "if there's ultimately any conviction, it probably ought to merge." As to the merits, the State argues that there is no anti-merger provision in either of the separate statutes, that solicitation and conspiracy do not merge with the substantive offenses, and that the solicitation occurred here after an extended period of "grooming."

Whether a conviction merges for sentencing purposes is a question of law that we review *de novo*. *Koushall v. State*, 2022 WL 324824 at 9 (Md. Feb. 3, 2022). "The rule of lenity is a matter of legislative intent, which applies when at least one of the offenses subject to the merger analysis is statutory." *Latray v. State*, 221 Md. App. 544, 555 (2015). The rule "give[s] the defendant the benefit of the doubt" when it is not clear whether the Legislature intended to provide for "two crimes arising out of a single act." *Walker v. State*, 53 Md. App. 171, 201 (1982). When we undertake to determine whether two offenses merge under the rule of lenity, we undertake a two-step analysis: we ask first whether the two offenses arise out of the same criminal conduct; and second, we ask whether the Legislature has expressed an intention to impose multiple punishments. *Wiredu v. State*, 222 Md. App. 212, 220 (2015). Judge Michelle Hotten, writing for the Court of Appeals in *Koushall*, explained as follows:

> "'As it is a principle of statutory construction, the rule of lenity applies where both offenses are statutory in nature or where one offense is statutory and the other is a derivative of common law.' *Khalifa*, 382 Md. at 434, 855 A.2d at 1194. '[I]f we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge.' *Monoker*, 321 Md. at 222, 582 A.2d at 529; *Jones v.*

> *State*, 357 Md. 141, 156, 742 A.2d 493, 501 (1999) ('Under the Double Jeopardy Clause, a defendant is protected against multiple punishment for the same conduct, unless the [General Assembly] clearly intended to impose multiple punishments.')."

Koushall, 2022 WL 324824 at 16.

Solicitation of a minor to engage in sexual activity is conduct separate from that involved in the sexual activity. *Poole v. State*, 207 Md. App. 614, 635 n.10 (2012). The Legislature intended separate punishments for the separate crimes.

Appellant argues that the sentence should merge because the two charges arose out of the same act or transaction. It is clear that the two crimes, solicitation, and third-degree sexual offenses are two separate, distinct crimes. Appellant is really arguing sufficiency of the evidence—that the sentences should merge because the solicitation is based upon only appellant's act of pushing the victim's head toward his genitals. He did not argue that the evidence was insufficient to support the crime. That is not a basis here for merger under the rule of lenity.

As to fundamental fairness, appellant never argued that before the trial court. The issue is not preserved for our review, and we decline to address it. *Koushall*, 2022 WL 324824 at 17.

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

The correction notice(s) for this opinion(s) can be found here:

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