Circuit Court for Anne Arundel County
Case No.: C-02-CR-17-000788

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 777

September Term, 2018

TRAVIS WESLEY FOSTER

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: July 17, 2019

*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.

Appellant, Travis Wesley Foster, was indicted in the Circuit Court for Anne Arundel County, Maryland, and charged with sexual abuse of a minor and other related counts. Following a jury trial, he was convicted of sexual abuse of a minor, second degree sexual offense, and third degree sexual offense. Appellant was sentenced to 25 years for sexual abuse of a minor, with all but 20 years suspended, followed by 15 years consecutive for second degree sexual offense, and a concurrent 5 years for third degree sexual offense, to be followed by 5 years supervised probation. Appellant timely appealed and presents the following questions for our review:

1. Did the Court improperly restrict cross-examination of the child's mother?
2. Was the evidence insufficient to sustain the conviction on Count Four, second degree sexual offense?
3. When sentencing on multiple counts, if the statements of the Court were contradictory and ambiguous, should a resentencing be ordered?
4. Was it error to admit evidence of a positive test for a sexually transmitted disease in the child?

For the following reasons, we shall affirm.

BACKGROUND

Numerous witnesses testified at trial. However, in view of the issues presented, we need not include a detailed summary of all the evidence adduced at trial. Instead, we shall include "only the portions of the trial evidence necessary to provide a context for our discussion . . . ." *Washington v. State*, 180 Md. App. 458, 461 n.2 (2008); *see also Thomas v. State*, 454 Md. 495, 498–99 (2017) ("Because the issue dispositive of this appeal does

not require a detailed recitation of the facts, we include only a brief summary of the underlying evidence that was established at trial”).

Eight-year-old E.M. testified that appellant was her stepfather and that he lived in her house, along with her mother and other siblings. Using anatomically-correct drawings of a girl and a boy, E.M. indicated that appellant inappropriately touched her near her vagina and her “[b]utt.”[1] On one occasion, appellant touched her vagina and butt, with his hand, while the two were sitting together on the living room couch. E.M. also testified that appellant’s penis also touched her on the outside of her vagina. On another occasion in her bedroom, appellant touched the outside of her vagina with his hand.

On a third occasion, this time in her mother’s bedroom, appellant instructed E.M. to bend over on the bed. He then touched both her vagina and her butt with his penis. E.M. testified that “it” went “[o]utside” and made her feel “[u]ncomfortable” and “[n]ervous.” E.M. also described a fourth occasion in the living room when appellant touched her while she was standing up near the couch. Appellant would also take E.M. to another location and, according to E.M., “[h]e kept telling [her] to get on top of him and he pulled his pants down and told [her] to pull [her] pants down.” Appellant placed his penis near her vagina. E.M. then testified as follows:

> Q. Okay. At any of those times, did he ever put it inside of you?

[1] E.M.’s school counselor and case worker with the Anne Arundel County Department of Social Services, testified that they met with E.M. around March 17, 2017, and that E.M. made similar disclosures to them, using a stuffed bear and names for appellant’s and her body parts such as “ding” and “kitty part.” E.M. consistently indicated that appellant touched her, both with his hands and his penis, “inappropriately” in E.M.’s vaginal and anal areas.

A. One time.

Q. One time?

A. Yes.

Q. Where?

A. Half.

Q. Half? In what?

A. (Indicating).

Q. In your bottom, okay.

Did he ever put it in –

A. No.

Asked to describe appellant's penis, E.M. testified that it was "peach on top and it's brown on the bottom."[2] E.M. further testified, as they were sitting on the living room couch, appellant showed her "grown videos of people doing what he was doing to [her]" on his cellphone while he touched her vagina with his hand.

On cross-examination, E.M. admitted that her mother injured her on two unrelated occasions when she threw a brush at E.M.'s head and punched her in the stomach. E.M. agreed that she previously denied that her mother caused the injury. E.M. also confirmed

[2] E.M.'s mother would later testify that appellant's penis was "brown, at the tip it's like pinkish, there's a bump on the side and it curves a little bit." After he was arrested and interviewed by the Annapolis Police Department, appellant consented to a photograph of his penis. According to Detective John Murphy, the lead investigator in this case, appellant was uncircumcised and "the head of the penis and about a [sic] inch below the head of the penis were, like a lighter tan color and the shaft was a dark brown, black."

that she was worried that if she did not listen to her mother that she could be punished or that her brothers and sisters would be "taken away[.]"

Dr. Howard Dubowitz, a pediatrician who was accepted as an expert in child abuse, sexual child abuse, and forensic sexual assault examination of children, examined E.M. on March 29, 2017. Although E.M. reported penile penetration of her vaginal and anal area, Dr. Dubowitz did not note any physical sign of injury or infection in this area during his exam. Upon closer examination, Dr. Dubowitz initially observed that part of E.M.'s hymen appeared to be missing, indicating the possibility of "penetrating trauma," but, upon a subsequent examination, he admitted that he was initially mistaken because there was a "very narrow rim of hymen" present. He continued that, although E.M.'s overall exam was normal, he could not "rule out the possibility or probability of [E.M] or a child like her having been abused." Finally, over objection, Dr. Dubowitz testified that E.M. tested positive for chlamydia, a sexually transmitted disease. We shall address other aspects of Dr. Dubowitz's testimony on this latter issue in the discussion that follows.

On March 17, 2017, the police obtained an arrest warrant based on E.M.'s allegations and went to serve that warrant on appellant at his apartment. After knocking on the door and announcing their presence, appellant was seen climbing out of his apartment onto a balcony, attempting to flee to an adjacent apartment. Appellant was apprehended and placed under arrest.

On June 15, 2017, while incarcerated at the Jennifer Road Detention Center, appellant requested to be tested for chlamydia, informing a nurse at the detention center that he knew someone who was infected. The State also filed a motion making the same

request on June 19, 2017. A sample was collected from appellant on June 26, 2017. Although a nurse testified this sample was sent to a lab, the lab claimed they never received the sample, and thus, there were no results as to whether or not appellant had tested positive for chlamydia. On July 10, 2017, the court signed an order directing appellant to submit to a chlamydia test. The next day, July 11, 2017, appellant refused to submit to further testing.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the court erred in not permitting him to cross-examine the victim's mother (Mother) about whether she would "admit to not taking [her] medication for [her] bipolar disorder." According to appellant, the State opened the door to this examination, which would have supported the defense theory that "the child's mother was mentally unstable and vindictive, and that she put her child up to making false allegations of child abuse, in order to get even with Appellant for his infidelities."

The State responds that appellant never proffered "what questions he intended to ask, the anticipated answers, or that the otherwise irrelevant evidence was rendered relevant because the State 'opened the door' to the issue of the victim's mother's mental health." On the merits, the State disputes that the door was opened to this examination and that, even if it were, the examination was not relevant.

Maryland Rule 5-103(a)(2) provides that there cannot be error in excluding evidence unless a party is prejudiced and "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." In other words, to argue on appeal that the trial court erred in excluding evidence a party must have made "a formal proffer of the contents and relevancy of the excluded evidence." *Grandison v. State*, 341 Md. 175, 207 (1995); *see also South Kaywood Cmty. Ass'n v. Long*, 208 Md. App. 135, 163 (2012) ("Where evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal") (quoting *Sutton v. State*, 139 Md. App. 412, 452 (2001)).

The rule serves two purposes. One reason is to allow for adequate review by appellate courts because "[w]ithout a proffer, it is impossible for appellate courts to determine whether there was prejudicial error or not." *Univ. of Maryland Med. Sys. Corp. v. Waldt*, 411 Md. 207, 235 (2009). The second reason is to encourage attorneys "to bring the position of their clients to the attention of the lower court at the trial, so that the trial court can pass upon and possibly avoid or correct any errors in the proceedings." *Braxton v. State*, 57 Md. App. 539, 549, *cert. denied*, 300 Md. 88 (1984).

Here, during Mother's cross-examination, defense counsel initially sought to establish that she failed to take her prescribed medication for chlamydia. Defense counsel asked, "you have a history, in fact, of not taking medication or following up with treatment; isn't that right?" After Mother answered in the negative, defense counsel asked whether Mother finished her antibiotics for a urinary tract infection, and also whether she failed to

take her medications to treat her bipolar disorder. The State's objections to these questions were sustained.[3]

Then followed a bench conference, the vast majority of which is marked as "indiscernible" in the transcript. As for the portion that is discernible, there is no indication what question or questions defense counsel wanted to ask about Mother's mental health. We note that the court repeated several times that Mother's "medical history is not at issue in this case." And, defense counsel agreed that there would be no expert testimony that would "tie that together," in the court's words. But, other than this, there does not appear to have been any proffer.

Ultimately, it is the appellant's responsibility to submit an adequate record for review and such a record is not presented in this case. *See Mora v. State*, 355 Md. 639, 650 (1999) ("It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed . . . ."); *Fields v. State*, 172 Md. App. 496, 513 ("An appellant has the burden of producing a record to rebut the general presumption that a trial court's actions are correct"), *cert. denied*, 399 Md. 593 (2007). Given the state of the record, we concur with the appellee that this issue is not properly presented for our review.

Moreover, even if we were to consider the merits on the grounds raised on appeal, generally, the Court of Appeals has explained the right to cross-examination as follows:

[3] During redirect, Mother testified that she took all of her prescribed medication to treat chlamydia after she received the positive results of her test, which occurred several days after visiting the hospital.

> The Supreme Court of the United States, this Court, and other courts throughout the country have observed that cross-examination is the "greatest legal engine ever invented for the discovery of truth." The right of a defendant in a criminal case to cross-examine a witness for the prosecution is grounded in the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Peterson v. State*, 444 Md. 105, 122 n.4 (2015). 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." *Martinez v. State*, 416 Md. 418, 428 (2010) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). To ensure the right of confrontation, defense counsel must be afforded "wide latitude to cross-examine a witness as to bias or prejudices." *Martinez v. State*, 416 Md. at 428 (quoting *Smallwood v. State*, 320 Md. 300, 307–08 (1990). 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." *Peterson*, 444 Md. at 122–23 (quoting *Martinez*, 416 Md. at 428); *see Van Arsdall*, 475 U.S. at 679; *see also Smallwood*, 320 Md. at 307–08 (stating that a trial court may limit cross-examination that "obscure[s] the trial issues and lead[s] to the factfinder's confusion").

Manchame-Guerra v. State, 457 Md. 300, 309–10 (2018) (footnote omitted).

Appellant claims that the door was opened to further inquiry concerning the victim's mother's mental health because the State used the mother's depression and self-description of her being "crazy" to explain why the mother was never aware of the abuse. The "doctrine of 'opening the door' to otherwise inadmissible evidence is based on principles of fairness." *Little v. Schneider*, 434 Md. 150, 157 (2013). It permits "parties to 'meet fire with fire,' as they introduce otherwise inadmissible evidence in response to evidence put forth by the opposing side." *Id*. (quotations and citations omitted). "The opening the door doctrine 'authorizes admitting evidence which otherwise would have been irrelevant in

order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection.'" *State v. Heath*, __ Md. __, No. 36, Sept. Term, 2018 (Filed June 28, 2019) (slip op. at 12) (quoting *Clark v. State*, 332 Md. 77, 84–85 (1993)). "Given that the open door doctrine is a matter of relevancy, which is a legal issue, this Court reviews the question of whether a party opened the door to introduce rebuttal evidence *de novo*." *State v. Robertson*, 463 Md. 342, 353 (2019) (citations omitted); *accord State v. Heath*, slip op. at 10. We examine the proportionality of the rebuttal evidence once the door has been opened. *Id.* at 358. On the secondary question of proportionality, we provide deference to the trial judge. *Id.*

However, in considering proportionality, the Court of Appeals has explained that there are limits to the "opening the door" rule:

> For example, it does not allow injecting collateral issues into a case or introducing extrinsic evidence on collateral issues. Such evidence is also subject to exclusion where a court finds that the probative value of the otherwise inadmissible responsive evidence "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." *See* Fed. R. Evid. 403; *see also* Lynn McLain, *Maryland Evidence* § 403.1, at 297 (1987).

Clark, 332 Md. at 87; *see also State v. Heath*, slip op. at 9 (recognizing that proportionality is a limitation to the opening the door doctrine) (citing *Terry v. State*, 332 Md. 329, 338 (1993)); *see also Grier v. State*, 351 Md. 241, 261 (1998) ("[T]he 'opening the door' doctrine does not permit the admission of incompetent evidence").

Moreover, "[t]his doctrine is narrow, and a response to the issues injected by the adverse party should be tailored appropriately." *Khan v. State*, 213 Md. App. 554, 574

(2013) (citations omitted). "The doctrine does not allow, for example, 'injecting collateral issues into a case or introducing extrinsic evidence on collateral issues.' A collateral issue is one that is immaterial to the issues in the case." *State v. Heath*, slip op. at 13 (quoting *Clark*, 332 Md. at 87, other citations omitted). Moreover, there is "an important guiding principle regarding the scope of rebuttal evidence permitted after the door has been opened: a party's rebuttal evidence cannot elicit details about a previous incident." *State v. Robertson*, 463 Md. at 364.

Here, Mother testified that she had four children and that appellant was E.M.'s stepfather. Mother explained that her relationship with appellant, after they had children together, "was really going down the drain" and they "were on and off." She admitted that she and appellant often fought in front of the children, including E.M., and that included both verbal and physical confrontations. Police responded to some of these events and Mother explained that she never pursued charges on those occasions "[b]ecause basically I loved him and I didn't want him – I didn't want to see him in jail, so I would write letters or so whatever to the Court and tell them like I was crazy and this, that, and the third, . . ." When asked whether those letters claiming she was "crazy or other things," were the truth, Mother testified that they were not and that she wrote the letters because she did not want to see appellant incarcerated.

Mother further testified on direct examination that, in March 2017, she was feeling "[d]epressed basically, a lot of times" and that this depression caused her to want to sleep. She admitted that she and appellant were not as intimate after the first two years of their relationship, and that appellant "loved watching porn."

In October 2016, Mother went to the hospital for an unrelated pain issue, and later learned as a result that she tested positive for chlamydia. After she reported this result to appellant, appellant was "shocked" and "stormed" out of the house. Appellant then returned shortly thereafter and informed her that he had been tested and he was "clean" and he did not have chlamydia.

In addition, Mother testified that she learned about E.M.'s allegations on or around March 17, 2017. Appellant left the house later that day.

On cross-examination, Mother admitted that she had previously persuaded E.M. to lie for her in order to "protect" Mother from being prosecuted for assault when she threw a brush at E.M.'s person. Mother also agreed she knew that appellant was involved with numerous other women and had fathered children with some of them. Mother also clarified that she went to the hospital on October 27, 2016 with pelvic pain, and that, as a result, she learned she tested positive for chlamydia.

Having considered this record, we first recognize that a witness's mental health records may, under certain circumstances, be relevant to protect a defendant's right to cross-examination. *See, e.g., State v. Johnson*, 440 Md. 228, 247–54 (2014) ("We reiterate that a balancing test followed by an *in camera* review is the appropriate method to protect both the defendant's constitutional rights and the victim's privacy rights in his or her mental health records."). Further, in deciding questions of admissibility of this type of evidence, this Court has stated:

> In determining the relevance of an inquiry into a witness's psychological instability, there is some room for discretion such as defining whether the particular disorder affects factors of credibility like memory, observation,

> exaggeration, imagination, etc. *But even that limited sphere is further restricted by the weight of the evidence so indicating*. The proffer need not be that proof beyond a reasonable doubt, or even by a preponderance of evidence, will show that such disorder is or was prevalent. It need only show that inquiry is likely to so divulge such a defect in the witness.
>
> The trial judge in liberally permitting a broad scope of credibility inquiry must balance not only the waste of judicial time factor (as was implicit here) against the value of exploration, but must take particular care not to permit annoying, harassing, humiliating and purely prejudicial attacks unrelated to credibility. *Like bad acts, not every disorder is relevant to a witness's credibility*.

Smart v. State, 58 Md. App. 127, 134 (1984) (emphasis added) (discussing *Reese v. State*, 54 Md. App. 281 (1983)).

In this case, we are not persuaded that a sufficient factual foundation was established to open the door to further questions concerning Mother's mental health. *See Peterson v. State*, 444 Md. 105, 135 (2015) ("As with any question permitted by Rule 5-616(a)(4) suggesting that a witness is biased or has a motive to testify falsely, there must be a factual foundation for the question."). To borrow from the State's brief, that Mother testified that she was "depressed" and told the police she was "crazy" when she recanted prior unrelated assault allegations against appellant "in no sense would have permitted the jury to infer that she had been diagnosed with depression, much less a bipolar disorder, or that she was (or was not) taking medication prescribed for a mental health issue[.]" Moreover, absent a coherent proffer, the court could have concluded that any probative value in permitting further inquiry as to whether Mother was actually clinically depressed and/or "crazy," in her own words, would be outweighed by the likelihood that the inquiry was for the purpose of harassing or humiliating the witness. *See generally, Treece v. State*, 313 Md. 665, 677

(1988) ("There is a stigma that often attaches, however unreasonably, to a person with a mental disease.").

Further, we also conclude that any error in excluding this cross-examination was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("An error is harmless when a reviewing court is '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'") (quoting *Mother v. State*, 276 Md. 638, 659 (1976)); *see also State v. Heath*, slip op. at 20 (discussing, but rejecting, claim of harmless error regarding claim under the opening the door doctrine.). The defense theory of the case was stated during closing argument as follows: "Mother manipulated, influenced and coerced a vulnerable [E.M.] into making these false accusations against Travis Foster" because appellant had had multiple relationships with other women and because he was planning to leave Mother.

Here, the jury was well aware that Mother had previously persuaded E.M. to lie for her, specifically, to protect Mother from being prosecuted for assault when she threw a brush at [E.M.]. The jury also knew of a possible motive when Mother agreed that she knew that appellant was "cheating" on her with a woman and that she confronted her on one occasion. They also heard evidence that appellant was involved with, and had children by, approximately three or four other women at around the same time. And, they knew of Mother's alleged manipulative and vindictive behavior, in part, when she confirmed that she texted appellant's mother, several days before the police were informed about E.M.'s allegations, to tell her that appellant should not return to their home else she would call the

police and obtain a protective order.[4] Finally, defense counsel also used Mother's "depression" during cross-examination to question her memory about a sexual assault that allegedly occurred in her bed while she was sleeping.

There was also expert opinion evidence which the jury could consider in evaluating Mother's role with respect to E.M.'s claims against appellant. During the cross-examination of Samantha Kanekuni, accepted as an expert in the field of sexual child abuse, Kanekuni agreed that children can delay disclosure due to fear and threats. These threats could come from a mother and could include having siblings "taken away[.]" The expert agreed that children might conclude that any "consequences are going to be their fault," adding that children "take responsibility." Kanekuni expressly agreed that it was possible that, such as in child custody cases, that a parent may influence a child "by using a threat in order to make an allegation against the other parent." The jury also heard her testify that a parent's undue influence could result in "false accusations[.]" And, she agreed that "attention-seeking" to "make a parent happy" "might" lead to false accusations.

In sum, based on the inadequate proffer at the trial level and the insufficient record on appeal, we hold that this issue has not been properly presented for appellate review. Moreover, not only did the State not open the door to permit cross-examination of the victim's mother's mental state, but also, any error was harmless beyond a reasonable doubt.

II.

[4] On redirect, Mother testified that, although appellant returned home after this and spent the night, she did not call the police or file for a protective order.

Appellant asserts that the evidence was insufficient to sustain his conviction for second degree sexual offense because there was no proof that his penis penetrated the victim's anus. The State argues the evidence was sufficient. We agree.

In reviewing for sufficient evidence, we ask "whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Hall v. State*, 233 Md. App. 118, 137 (2017) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)). This Court has noted that in this undertaking, "the limited question before us is not 'whether the evidence should have or probably would have persuaded the majority of fact finders but only whether it possibly could have persuaded any rational fact finder.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (emphasis and citation omitted). "In short, the question 'is not whether we might have reached a different conclusion from that of the trial court, but whether the trial court had before it sufficient evidence upon which it could fairly be convinced beyond a reasonable doubt of the defendant's guilt of the offense charged[.]'" *Spencer v. State*, 422 Md. 422, 434 (2011) (emphasis omitted, quoting *Dixon v. State*, 302 Md. 447, 455 (1985)).

At the time of the alleged offenses, second degree sexual offense provided, in pertinent part, that: "[a] person may not engage in a sexual act with another . . . if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim." Md. Code (2002, 2012 Repl. Vol., 2016 Supp.) § 3-306(a) of the

Criminal Law Article ("Crim. Law").[5] A "sexual act" includes "an act in which an object or part of an individual's body penetrates however slightly, into another individual's genital opening or anus; and that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party." Crim. Law § 3-301(d)(v).

Here, the victim testified that appellant inserted his penis "half" into her bottom. This was sufficient to sustain the conviction. *See Wilson v. State*, 132 Md. App. 510, 520–23 (2000) (observing, with respect to both vaginal and anal penetration, that prima facie proof of penetration may be established by extrinsic medical evidence as well as testimony from the victim).

III.

Appellant next states that resentencing is required because the judge's remarks about his sentence for second degree sexual offense was ambiguous. The State responds that the court clarified the sentence and there was no ambiguity. We concur.

As the State noted at the disposition hearing, the sentencing guidelines in this case called for a sentence of between 30 to 45 years. The guidelines also suggested that appellant's sentence for second degree sexual offense be consecutive to the sentence for sexual child abuse. Following this, and noting that there was a discrepancy between how the counts were listed in the indictment and in the guidelines, the court sentenced appellant as follows:

[5] Appellant was charged with former Crim. Law § 3-306 for offenses committed between August 26, 2015 through March 17, 2017. Section 3-306 was repealed effective October 1, 2017. *See* 2017 Md. Laws Ch. 162 (H.B. 647). The offense was recodified as second degree rape. *See* Crim. Law § 3-304.

> THE COURT: Yeah, 1, 4, 6. All right.
>
> So as to Count 1, sex abuse of a minor, the Court does sentence the Defendant in this case to a term of 25 years, suspend all but 20 years.
>
> As to Count 4, second-degree sexual offense, the Court does sentence the Defendant to a term of 15 years to be served consecutive -- concurrently with Count 1.
>
> And as to Count 6, third-degree sex offense, the Court sentences the Defendant to 5 years, which is the maximum on the guideline, and that is to be served concurrently as well.
>
> THE CLERK: Concurrent with counts --
>
> THE COURT: So Count 1, Count 2 to be consecutive, Count 3 to be served concurrently with Count 2.
>
> THE CLERK: Okay. And 2 is consecutive?
>
> THE COURT: Yeah, Count 2 is consecutive.
>
> THE CLERK: Okay.
>
> THE COURT: Upon the release of the Defendant he will be placed on five years probation. There does need to be the Court finds evaluation and treatment.
>
> THE CLERK: Supervised probation?
>
> THE COURT: Supervised probation as a sex offender. There is to be no contact with [E.M.] . . .

While we recognize that any ambiguity in sentencing should be resolved in favor of lenity, *Robinson v. Lee*, 317 Md. 371, 380 (1989), we are not persuaded that the sentence was ambiguous under the circumstances. In analyzing whether there is ambiguity in a sentence, we look to three sources of information: (1) the transcript of the sentencing proceedings; (2) the docket entry; and (3) the order for commitment or probation. *Dutton v. State*, 160 Md. App. 180, 193 (2004) (citing *Jackson v. State*, 68 Md. App. 679, 687–88

(1986)), *cert. denied*, 385 Md. 512 (2005). We review the transcript of the proceedings in conjunction with the docket entries and commitment orders to determine the terms of the sentence. *See Dutton*, 160 Md. App. at 191–92.

Here, the sentencing judge initially indicated the sentence for second degree sexual offense was to be consecutive to the sentence for sexual abuse of a minor, then indicated it would be served concurrently. When asked by the clerk to clarify, the judge was clear that the sentence for second degree sexual offense was to be served consecutively. This consecutive sentence is reflected in the commitment record and the docket entries. The Court of Appeals has explained that "[t]he trial judge's obligation is to articulate the period of confinement with clarity so as to facilitate the prison authority's task." *Robinson v. Lee*, 317 Md. at 379. We conclude that appellant's sentence for second degree sexual offense was not ambiguous.

IV.

Finally, appellant challenges aspects of Dr. Dubowitz's testimony regarding E.M.'s test results showing that she tested positive for chlamydia. Appellant argues: (a) the State failed to prove the chain of custody of E.M.'s urine specimen; and (b) there was no confirmatory test establishing that E.M. actually had chlamydia. The State does not respond to appellant's chain of custody argument on the merits, other than to note that the lab report showing the test results was admissible as a business record, but instead, contends that the issue was waived because defense counsel did not ask for a continuing objection. The State does respond on the merits to appellant's secondary argument,

asserting that whether a secondary confirmatory test was required goes to the weight of the evidence, not its admissibility.

Prior to trial in this case, defense counsel moved to exclude the presumptive test results for chlamydia on the grounds that it was akin to a "field test" for narcotics and was "not a confirmatory test[.]" The State responded that a different analogy would be to compare the test for chlamydia to serology testing for the presence of human blood. The State also argued that the issue was one of weight of the evidence and not admissibility. The motions court agreed, ruling that "it's clearly relevant" and that it was not "unduly prejudicial" and "it goes to the weight of the evidence rather than its admissibility."

Subsequently, after jury selection, defense counsel renewed the motion, arguing that admission of the lab report showing that the victim tested positive for chlamydia violated his confrontation rights.[6] Defense counsel also argued that she wanted to be able to question everyone in the chain of custody of the test, and that the expert who would testify as to the results was basing his opinion on a presumptive test.

The State responded by first clarifying that the proper medical terms for these tests were not "presumptive" and "confirmatory," but "screening" and "diagnostic." The State continued that "it's my understanding that this particular test has a high accuracy or a high sensitivity in its screening. It's like 98 percent accurate." The State maintained that appellant's arguments went to the weight of the evidence and not their admissibility.

[6] This argument is not being pursued on appeal and we will not discuss it further.

During trial, and as part of his examination of E.M., Dr. Dubowitz testified that he ordered a urine test to test for chlamydia and gonorrhea. Dr. Dubowitz then testified as follows:

> Q. Did there come a time that you learned of the results of that test?
>
> A. I did.
>
> Q. And what was the results of that test?
>
> [DEFENSE COUNSEL]: I'm going to object.
>
> THE COURT: Overruled.
>
> THE WITNESS: So the test for chlamydia came back positive.

Dr. Dubowitz's direct examination continued:

> Q. And do you recall when you learned that?
>
> A. It was later I think in the following week, perhaps about five days later.
>
> Q. Okay. I'm going to show you what's been marked as State's Exhibit No. 11, I apologize I didn't have it pulled for you and ask if you recognize what that is.
>
> A. I do.
>
> Q. And what is that?
>
> A. This is a report from the state lab.
>
> Q. And what did it indicate?
>
> A. And it indicated that the test was positive for chlamydia but not for gonorrhea.
>
> [PROSECUTOR]: Your Honor, at this point, the State would move to have State's Exhibit No. 11 admitted into evidence.
>
> [DEFENSE COUNSEL]: I'd object, Your Honor.

THE COURT: Overruled, State's 11 will be admitted.

(Whereupon, State's Exhibit No. 11 was marked and received into evidence).[7]

Asked to provide more details about the test for chlamydia, defense counsel objected, and a bench conference ensued. As was the case with much of this trial, most of the bench conference discussions are marked "indiscernible" in the transcript. Indeed, we note that, at one point, the court sustained an objection, the grounds of which are not clearly delineated in the transcript. We note, it is the appellant's responsibility to provide a record of the matters he wishes this Court to review. *See Mora, supra,* 355 Md. at 650; *Fields, supra*, 172 Md. App. at 513.

Dr. Dubowitz then testified concerning the test, explaining that the Nucleic Acid Amplification Test ("NAAT") looks for DNA from specific bacteria associated with

[7] The report from the Maryland Department of Health, Laboratories Administration, indicating that E.M. tested positive for chlamydia, but not gonorrhea, was certified as a business record by a custodian of records for the Department. The report indicates that it was ordered by Dr. Dubowitz, that the source of the specimen was [E.M.] and "[u]rine first void" and that it was collected on March 29, 2017 and received on March 30, 2017 at 10:28 a.m. No further information is provided as to the collection procedures. The report then lists the results for the tests for chlamydia (positive) and gonorrhea (negative). The report also includes the following "[r]elease statement": "[t]he results are not to be used as a sole means for diagnosis, treatment or for the assessment of a patient's health. Clinical correlations and/or epidemiological correlation are required." And, further, "[t]he BD ProbeTec CT and GC Qx Amplified DNA Assay should not be used for the evaluation of suspected sexual abuse or for other medical-legal indications. Additional testing is recommended in any circumstance when false positive or false negative results could lead to adverse medical, social, or psychological consequences." The report concludes with a certification from a custodian of records, dated April 5, 2018, indicating that the report was a record of a regularly conducted business activity and was made at or near the time of occurrence of the matters set forth therein.

chlamydia in order to determine if there is infection. Over objection, Dr. Dubowitz was asked about the accuracy of the test and replied, "this test or these kinds of tests are very, very sensitive and have in recent years been approved by the Centers for Disease Control for testing children and adults actually for these sexually transmitted infections." Acknowledging that false positives and false negatives are possible, Dr. Dubowitz testified, over objection, that "with this specific test, it's thought to have a very high success rate in picking up those individual's kids or adults who have the infection in the high 90s percent, 98 or so percent." He continued "so that it's a test that overall one would say is not perfectly [sic] but it is very, very accurate."

Dr. Dubowitz concluded his direct examination as follows:

> Q. All right. Are there any other ways – I guess let's talk about other possible ways that are often brought up for transfer. What about when you see chlamydia, or does it happen that you see chlamydia in toddlers or children of that age group?
>
> A. So there's no clear other way that I've – from what I've described that explains how a child would contract this infection.
>
> Q. Okay. Doctor, I guess then to a reasonable degree of medical certainty, what is the most likely mode of transfer of chlamydia?
>
> A. In this child?
>
> Q. In this child, yes, sir.
>
> A. Through some kind of sexual contact.
>
> Q. And is that, again to a reasonable degree of medical certainty consistent or inconsistent with a history that was provide to [E.M] or by [E.M.]?
>
> A. Yes, consistent with.

On cross-examination, Dr. Dubowitz agreed that children ordinarily want a parent in the room during the examination, but he could not recall if E.M.'s mother was in the room at the time. Dr. Dubowitz was also asked several questions about the chain of custody, as follows:

> Q. And neither -- in regards to that, neither of you or the nurse go to the bathroom with the patient in order to collect the urine sample, right?
>
> A. So the nurse is the one who does this, and if you're asking if she's in the bathroom --
>
> Q. Correct.
>
> A. So sometimes with younger kids, the nurse will help them. And I actually don't recall specifically whether that was the case here.
>
> Q. And sometimes with younger kids, a parent can help them, correct?
>
> A. That's also possible.
>
> Q. Okay. And in this case, you don't know whether Ms. Mother accompanied [E.M.] to the bathroom, correct?
>
> A. I'm not sure.
>
> Q. Okay. And in regards to the collection of the urine specimen, you don't know who collected it, correct?
>
> A. I'm not sure.
>
> Q. You don't know who ended up I guess being in possession of that sample, that urine sample, the person who was responsible.
>
> A. Well, the nurse is the one who typically quickly collects it.
>
> Q. Okay. And then after that, you didn't see what was done in regards to this sample, right?
>
> So again, this is the nurse's responsibility and she takes the specimen to the lab.
>
> Q. Okay. In this case, you didn't take the specimen to the lab.

A. I personally did not.

Q. All right. And when it goes to the lab, it's not tested by you, right?

A. No.

Q. And who tested it at the lab?

A. The specific person?

Q. Yes.

A. That I never know.

Q. And you also don't know how the specimen was actually tested, correct?

A. No, I do know because that method is described in the report, and I discussed with the head of the lab.

Dr. Dubowitz was also asked whether the test was just a presumptive test to "screen for the possible presence of substances or diseases," and he replied, "actually it's also used as a diagnostic test, so it's not just a presumptive screen." And, he agreed with defense counsel's query that a "confirmatory test" could be done to "conclusively identify the presence of substances or diseases," but that was not done in this case. Dr. Dubowitz then acknowledged that, "a few years ago," scientific treatise suggested performing a confirmatory test to diagnose children, but "it's changed in more recent publications, including information from the CDC [Centers for Disease Control]." But, he agreed that there were recent scientific studies that recommended further testing following a positive net result.

Dr. Dubowitz was further cross-examined about other possible means of transmission of chlamydia and acknowledged that there had been a suggestion that it could

be transmitted if an infected mother cleaned herself and then touched the genital area of a child. There was also a recent study indicating that there was a "potential for urine contaminated fingers to contaminate a negative chlamydia screen to a positive one as a result of contact[.]" Dr. Dubowitz agreed there were no physical symptoms apparent during E.M.'s examination indicating a chlamydia infection.

On redirect examination, Dr. Dubowitz explained that the reason why the scientific literature had evolved was because the initial screening test "finding the DNA of the bacterium as absolutely reliable and, in fact, far more reliable than the regular culture that we used for many years." In other words, he continued, "[t]he screening test and the support for it has been evolving, right." He maintained that the test only had false positives in approximately 2 percent of cases. But, he agreed there were some experts that still advocated for a second test.

With respect to whether chlamydia could be transmitted by a washcloth, Dr. Dubowitz testified that it was "thought to be extremely unlikely[.]" Asked whether it could be transmitted if an infected person was involved in the collection process, he opined that "it's extremely unlikely, but in medicine we never say never, which drives people nuts, and so if I'm asked is it possible, I have to say it's possible." Dr. Dubowitz's redirect concluded as follows:

> Q. Doctor, what is the most likely method of transmission of chlamydia in [E.M.'s] situation?
>
> A. Sexual contact.

A trial court's ruling on the admissibility of evidence is ordinarily reviewed for abuse of discretion. *Wheeler v. State*, 459 Md. 555, 645 (2018). Generally, for physical evidence to be admissible, the offering party must "establish the 'chain of custody,' *i.e.,* account for its handling from the time it was seized until it is offered in evidence." *Lester v. State*, 82 Md. App. 391, 394 (1990). The purpose of this requirement is to ensure "physical evidence has been properly identified and that it is in substantially the same condition as it was at the time of the crime." *Amos v. State*, 42 Md. App. 365, 370 (1979). "The chain of custody need not be established beyond a reasonable doubt—the State need prove only that there is a 'reasonable probability that no tampering occurred.' *Cooper v. State*, 434 Md. 209, 227 (2013) (quoting *Breeding v. State*, 220 Md. 193, 199 (1959)). *Johnson v. State*, 240 Md. App. 200, 211 (2019), *cert. granted on other grounds*, 463 Md. 550 (2019).

However, as with all evidentiary matters challenged on appellate review, any issue with respect to the chain of custody must have been properly preserved at trial. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ."); *see also* Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived"). In *Robinson v. State*, the Court of Appeals explained that the Rule "requires an appellant who desires to contest a court's ruling or other error on appeal to have made a timely objection at trial. The failure to do so bars the

appellant from obtaining review of the claimed error, as a matter of right." 410 Md. 91, 103 (2009).

Furthermore, "it is fundamental that a party opposing the admission of evidence must object at the time that evidence is offered." *Klauenberg v. State*, 355 Md. 528, 545 (1999); *see also* Md. Rule 4-323(a). "This also requires the party opposing the admission of evidence to object each time the evidence is proffered by its proponent." *Klauenberg*, 355 Md. at 545. As this Court has explained:

> "It is well established that a party opposing the admission of evidence 'shall object' at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. *Wimbish v. State,* 201 Md. App. 239, 260–61 (2011) (quoting Md. Rule 4-323(a)) (additional citations omitted). If not, the objection is waived and the issue is not preserved for review. *Id*. at 261. Also, "to preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Id*. (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)). "Th[is] requirement of a contemporaneous objection at trial applies even when the party contesting the evidence has made his or her objection known in a motion in limine[.]" *Id*.

Fone v. State, 233 Md. App. 88, 112–13 (2017); *see also Kang v. State*, 393 Md. 97, 120 (2006) (ultimately holding that petitioner did not obtain a continuing objection merely by offering one; the court needed to expressly grant the continuing objection).

Although appellant objected when Dr. Dubowitz first testified that the victim's test for chlamydia came back positive, and when the test results were admitted as an exhibit, appellant did not object when the witness testified that the report "indicated that the test was positive for chlamydia but not for gonorrhea." As is established, there must have been an objection to each and every question on the topic.

Moreover, Maryland appellate courts have recognized waiver when the same or similar matters are introduced without objection. In *Yates v. State*, 429 Md. 112, 120–21 (2012), the Court of Appeals stated: "Where competent evidence of a matter is received [without objection], no prejudice is sustained where other objected to evidence of the same matter is also received." (citation and internal quotation marks omitted); *see also DeLeon v. State*, 407 Md. 16, 30–31 (2008) (holding that a defendant waived an objection to what he claimed was irrelevant and highly prejudicial testimony about his purported gang affiliation because "evidence on the same point [was] admitted without objection" elsewhere at trial); *Ellerba v. State*, 41 Md. App. 712, 725 (1979) ("It is fundamental that, irrespective of the disposition of an original objection, a subsequent failure to object to the same evidence introduced through the same or different witnesses waives the error on appeal"), *cert. denied*, 285 Md. 729 (1979).

Here, appellant did not object when Dr. Dubowitz testified that he prescribed an antibiotic to "take care of this infection." There also was no objection when the witness testified, to a reasonable degree of medical certainty, that the "most likely mode of transfer of chlamydia" in E.M. was "[t]hrough some kind of sexual contact" and that was consistent with the history provided by E.M. Finally, we also note that there was no objection during redirect examination when Dr. Dubowitz agreed that the "most likely method of transmission of chlamydia in [E.M.'s] situation" was "[s]exual contact." We are persuaded that the issue regarding the chain of custody of E.M.'s test results, showing that she tested

positive for chlamydia and that the most likely means of transmission was through sexual contact, was not properly preserved at trial.[8]

As for appellant's claim that there was no confirmatory test for the victim's urine sample, appellant does not cite any law in support of his position. We do note that the appellant is not contending that the presumptive/screening test is not generally accepted under *Frye/Reed* principles. *See Savage v. State*, 455 Md. 138, 157–58 (2017) (explaining that, under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as adopted in *Reed v. State*, 283 Md. 374 (1978), "evidence emanating from a novel scientific process inadmissible absent a finding that the process is generally accepted by the relevant scientific community"); *accord Clemons v. State*, 392 Md. 339, 343–44 (2006). Nor is appellant suggesting that the test results could only be admitted through an opinion from an expert in an associated field. *See generally* Md Rule 5-702 (providing the general requirements for the admission of expert opinion); S*antiago v. State*, 458 Md. 140, 153–54 (2018) ("[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal").

[8] Although we express no opinion on the merits of the chain of custody question, we note that, as for appellant's test results, when a nurse from the Detention Center testified about collecting a urine specimen from appellant, he explained that, ordinarily, "[w]hen it's collected, it's -- we properly label it with his name on the actual lab slip and also on the container. His name, his digit numbers that's used in the Jennifer Road. It's placed in the package, sealed, and it's labeled also on the outside. It's placed in a refrigerator which is on the third floor and then normally the courier picks it up early that next morning." The nurse confirmed that this procedure was followed with respect to appellant's urine specimen.

Instead, appellant appears to be making a general claim under evidentiary admissibility standards. The Court of Appeals has explained the standard for reviewing a circuit court's admission of evidence as follows:

> [O]rdinarily a trial court's ruling[s] on the admissibility of evidence are reviewed for abuse of discretion. A court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable. Further, even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards. As such, we examine a trial court's admissibility determinations for an abuse of discretion.

Wheeler v. State, 459 Md. 555, 560 (2018) (internal citations and quotations omitted).

Here, Dr. Dubowitz testified that the NAAT looks for DNA from specific bacteria associated with chlamydia in order to determine if there is infection. He acknowledged that, although false positives and false negatives are possible, the accuracy of the test, considered as a diagnostic test and not just a mere screening, was, in recent years, close to 98 percent accurate. Indeed, he explained that this test for "finding the DNA of the bacterium" was considered "absolutely reliable and, in fact, far more reliable than the regular culture that we used for many years." We are persuaded that the trial court properly exercised its discretion in admitting this evidence.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.