UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1341

September Term, 2012

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FERNANDO ASTURIZAGA

v.

STATE OF MARYLAND

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Berger,
Nazarian,
Leahy,

JJ.

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Opinion by Leahy, J.

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Filed: August 21, 2015

A jury in the Circuit Court for Montgomery County, Maryland, convicted Appellant, Fernando Asturizaga, of multiple counts of child abuse, second degree rape, second degree sexual offense, and third degree sexual offense, committed over the course of 3 years against then 9-12 year-old H.T.[1] After he was sentenced to a total of 168 ½ years, Appellant timely appealed and presents the following questions for our review:

1. Did the trial court err by unduly limiting Appellant's right to cross-examine the complaining witness as a result of its misapplication of the Rape Shield Statute?

2. Did the trial court err in admitting prior consistent statements made by H.T.?

3. Did the trial court err in allowing the State to examine a witness that it had failed to include on the witness list?

4. Did the trial court err in improperly limiting the defense's cross-examination of Dr. Northup?

We hold that the trial court did not abuse its discretion in limiting the introduction of statements made by H.T. concerning her sexual history; that the court did not err in allowing prior consistent statements made by H.T. for the purpose of medical treatment; that the court did not abuse its discretion in allowing a witness to testify who was not on the witness list; and that the court did not abuse its discretion in limiting cross-examination of Dr. Northup. We affirm.

[1] We shall refer to the victim and all minors involved in this case by their initials. *See Hajireen v. State*, 203 Md. App. 537, 540 n.1, *cert. denied*, 429 Md. 306 (2012); *see also Thomas v. State*, 429 Md. 246, 252 n.4 (2012) (referring to sexual abuse victim by first initial of her first name); *State v. Mayers*, 417 Md. 449, 451 (2010) (referring to the victim by her initials).

## BACKGROUND

Although Asturizaga does not challenge the sufficiency of the evidence to support his convictions, we summarize the facts presented at Asturizaga's jury trial conducted over five days, from February 13 through 17, 2012, in the Circuit Court for Montgomery County to provide context for our examination of Asturizaga's contentions of error. *See Goldstein v. State*, 220 Md. 39, 42, (1959) (noting that "[t]o understand the contentions made, it is necessary to relate some of the background of the case"); *Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

The victim, 24-years-old at the time of trial, testified that after her parents separated in 1997, she, her brother, S.T., and her stepsister, A.S., would spend alternate weeks with her mother, and with her father and stepmother. Asturizaga was a Spanish teacher at the school H.T. attended. He also managed the afterschool care program at the school, as well as the school summer camp that H.T. attended. At some point during fourth grade, H.T.'s mother began employing Asturizaga as a babysitter in her home. H.T.'s father soon began to rely on Asturizaga to babysit for him as well.

At first, Asturizaga babysat H.T. once a week. Then, by fifth grade, the babysitting arrangements expanded to multiple times a week. On some occasions, usually when her mother or father were running late to pick her up at the aftercare program, Asturizaga would drive H.T. home. One night, while she was 9 or 10-years-old and still in fourth grade, Asturizaga babysat H.T. and her brother at their mother's house. After her brother went to sleep, Asturizaga sat behind her, and began fondling her breasts and her upper body. This continued on multiple occasions and the contact progressed to

Asturizaga kissing her, digitally penetrating her vagina, and then, to fellatio and cunnilingus. This conduct continued while H.T was at summer camp between fifth and sixth grade.

H.T. further testified that Asturizaga and her father became friends. In fact, Asturizaga was invited to join the family in 1999 on vacation in Maine when H.T. was 11-years-old. There, the sexual contact continued in the living room of the rented vacation home as before. One day during this vacation, Asturizaga and H.T. took a rowboat out to a small island. H.T. testified that was where she and Asturizaga first had sexual intercourse.

After they returned from the vacation, the sexual contact continued throughout the summer prior to H.T. attending sixth grade, both at her father's home as well as at Asturizaga's home. H.T. testified that, at her father's residence on McArthur Boulevard, Asturizaga had intercourse with her between 15 and 20 times, fellatio 15 to 30 times, cunnilingus 5 to 10 times, and digital penetration "at any opportunity . . . ."

It was during the month of May, 2000, that H.T.'s mother disappeared.[2] After mother's disappearance, and, after her father moved to Bradford Road between her sixth and seventh grade years, H.T.'s brother Sam testified that Asturizaga increased the amount he spent with Sam and H.T. and spoiled them with gifts. H.T. estimated that Asturizaga had vaginal intercourse with her 20 to 30 times, fellatio 10 times, cunnilingus

[2] At the time of the trial, H.T.'s mother was still missing. Prior to her mother's disappearance, one evening after Appellant had dropped them off at home, H.T. and her brother witnessed an incident in which their mother got into an altercation with Appellant and slapped Appellant and their father.

5 to 10 times, and digital penetration "upwards of 30 times" at her father's new residence. She would later clarify that Asturizaga had intercourse with her on "hundreds" of occasions over the course of the abuse. H.T. also testified that she believed, at the time, that she and Asturizaga were in a relationship, but she knew that "nobody could know about [it], and I became very good at covering up for it . . . ." In fact, H.T. feigned menstrual pain to get contraception at age 12. The abuse continued over three years.

After several prior attempts to get out of the relationship, H.T. succeeded in the spring of 2001, when H.T. was in seventh grade and she told Asturizaga that she should not continue seeing him anymore. During the abuse and for years after, H.T. did not tell anyone, including her therapist.

H.T.'s best friend was J.D., whom she met in seventh grade. Eventually, when she was a junior in college on or around February 2009, while on study abroad in Ghana, H.T. told J.D., as well as another friend, A.B., about her abuse by the Asturizaga. Without objection, at trial H.T. testified that she told them both that she had been raped by Asturizaga between ages 10 and 13. H.T. also testified that subsequently, in August 2009, she told Dr. Northup "some details," about this relationship, as well as her therapist, Paulette Hurwitz. In addition, H.T.'s father, J.T., testified without objection that sometime in October 2010 his daughter told him that Asturizaga sexually abused her.

In September 2010, H.T. met with Detective Katie Leggett, of the Montgomery County Police Department and gave her a detailed account of Asturizaga's abuse. H.T. gave consent to participate in a recorded phone call with Asturizaga. The recording of that call was played for the jury. In the recording, H.T. repeatedly referenced the acts of

abuse to which Asturizaga subjected her. Asturizaga, in response, did not deny the acts, but instead tried to skirt the issue and speak in generalities. Thereafter, on or around October 26, 2010, Asturizaga and H.T. agreed to meet, in person, at a delicatessen on Georgia Avenue in Silver Spring. H.T. was wearing a listening device during that meeting. H.T. recalled that, at some point during that meeting, Asturizaga told her "that he never forced me to do anything." Asturizaga was arrested on an existing arrest warrant immediately following this meeting.

We shall include additional detail in the following discussion.

## DISCUSSION

### I.

Appellant first contends the trial court abused its discretion by prohibiting him from cross-examining H.T. on whether she told someone that she actually lost her virginity at age 16 to a person other than Appellant. Appellant asserts that this inquiry was proper under the Rape Shield Statute, codified at Maryland Code (2002, 2012 Repl. Vol.), § 3-319 of the Criminal Law ("C.L.") Article, because it was offered to impeach H.T. after the prosecutor had put her prior sexual conduct in issue. The State responds that the proposed inquiry was not admissible under the Rape Shield Statute and that any error was harmless beyond a reasonable doubt.

The issue first arose when, during a break in jury selection, defense counsel proffered that it had information that H.T. told J.D. that she lost her virginity at age 16 to "Jimmy." Because counsel anticipated this would be inconsistent with H.T.'s testimony, counsel asked the court to permit cross-examination not only on this subject, but also on a

claim by H.T. that she was abused by a cousin.[3] The court ruled that the matter could be addressed later during trial.

During her direct examination, H.T. testified that the first time Appellant had intercourse with her was when she was 11-years-old. In addition to this testimony, the jury heard the recorded phone conversation between H.T. and Appellant wherein H.T. repeatedly accused Appellant of taking her virginity. Defense counsel again broached the subject of wanting to cross-examine H.T. about whether she told J.D. that she lost her virginity at age 16 to a boy named "Jimmy." Counsel explained this was proper impeachment evidence because H.T. had testified she lost her virginity to Appellant when she was 11-years-old, thus putting her prior sexual conduct and the loss of her virginity at issue, and opening the door for impeachment with any prior inconsistent statement(s). The State responded that, under the Rape Shield statute, Appellant was precluded from inquiring into this other instance because the State did not open the door for impeachment. After indicating that she had read the statute and supporting cases, the presiding judge ruled that H.T. could not be questioned about whether she told someone that she lost her virginity to someone other than Appellant.

"The scope of cross-examination lies within the sound discretion of the trial court." *Pantazes v. State*, 376 Md. 661, 681 (2003) (citing *Walker v. State*, 373 Md. 360,

[3] H.T. testified that she told Appellant that she had been touched in a sexual manner by a cousin, however, she testified that was not true. H.T. explained that she made up this story during an encounter with Appellant in the school library, during the early stages when Appellant was touching and abusing her, in an effort, she thought, to show that she did not like to be touched.

394 (2003). Discretion is exercised by balancing "the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion." *Pantazes*, 376 Md. at 681 (quoting *State v. Cox*, 298 Md. 173, 178 (1983)); *see also Mines v. State*, 208 Md. App. 280, 295 (2012) ("Managing the scope of cross-examination is a matter that falls within the sound discretion of the trial court[,]" and its ruling will not be disturbed "absent a showing of prejudicial abuse of discretion.") (citations and internal quotation marks omitted), *cert. denied*, 430 Md. 346 (2013).

The Rape Shield Statute provides:

> (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:
>
> (1) a crime specified under this subtitle or a lesser included crime;
>
> (2) the sexual abuse of a minor under § 3-602 of this title or a lesser included crime; or
>
> (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.

(Emphasis added). "Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity . . . [is] per se excluded under the Rape Shield Law." *Shand v. State*, 103 Md. App. 465, 475 (1995), *aff'd*, 341 Md. 661 (1996); *see also Lucado v. State*, 40 Md. App. 25, 32 (1978) ("There are no exceptions to this prohibition, which appears to apply whether the evidence is offered by the prosecution or the defense"). As the Court of Appeals explained in *White v. State*, 324 Md. 626, 634 (1991), the Rape Shield Law was enacted "to prevent defense counsel from putting the victim 'on trial,' from unfairly invading the victim's privacy and from deflecting the jury's attention from the true issue.'"

Notwithstanding this clear prohibition, Appellant relies on the statutory exception under subsection (b), arguing that the evidence proffered was admissible for impeachment purposes under (b)(iv) since H.T. placed her prior sexual contact at issue. The Court of Appeals has made clear that "[a] trial court's ruling on the admissibility of specific instances of a victim's past sexual conduct is subject to review on an abuse of

discretion standard." *Johnson v. State*, 332 Md. 456, 464 (1993) (citations omitted). Further:

> To be admissible, evidence of specific instances of a victim's past sexual conduct must fit within one of the enumerated exceptions *and* be found by the trial court to be relevant and material to a fact at issue in the case and to have probative value greater than its inflammatory or prejudicial nature.

*Johnson*, 332 Md. at 463-64 (emphasis added); *see Smith v. State*, 71 Md. App. 165, 182 (1987) ("In evaluating these three conditions, decisions on the relevance or inflammatory nature of the evidence rest in the sound discretion of the trial court and will not be reversed on appeal absent a showing that such discretion was clearly erroneous"). As we explained in *Testerman v. State*, the test for admissibility under the Rape Shield Statute is first, one of relevancy. 61 Md. App. 257, 263 (1985). Second, the evidence must be material to a fact in issue and, third, its probative value must not be outweighed by its inflammatory prejudicial nature. *Id.*

We note that this case concerns allegations involving, at the pertinent time, the rape of an 11-year-old child. Recognizing the precept that minors cannot consent to sexual intercourse, along with the requirement set forth in C.L. § 3-319(b)(2) that the prior sexual conduct must be "material to a fact in issue," we conclude that the exception set forth by C.L. § 3-319(b)(4)(iv) is inapplicable to this case. *See Rau v. State*, 133 Md. 613, 615 (1919) ("The prosecutrix, under the law, by reason of her age, was not capable of consenting to sexual intercourse with the traverser, and the question of her prior intercourse with another or chastity was not a material issue, and could not reflect upon his guilt or innocence, under the fourth count of the indictment."); 3 Wharton's *Criminal*

*Law* § 286, at 80 (15th ed.) ("In a prosecution for statutory rape, the victim's prior sexual conduct is not admissible."); *see also Wheeler v. State*, 88 Md. App. 512, 527-28 (1991) (concluding, in a case where appellant claimed victim consented to sexual acts, that evidence that victim had a consensual relationship with another person prior to the alleged incident with appellant was neither relevant nor material as the State did not put victim's prior sexual conduct in issue).

Appellant's reliance on *Churchfield v. State*, 137 Md. App. 668, *cert. denied*, 364 Md. 536 (2001), and *State v. DeLawder*, 28 Md. App. 212 (1975), is misplaced. Both of these cases concerned limitations on cross-examination of the victims where there was strong evidence suggesting the victims had a motive to falsify their testimony. *See Churchfield*, 137 Md. App. 688 (observing, in a child abuse case, that where defense sought to inquire whether the victim was sexually active with two male schoolmates, that "appellant has proffered more than a scintilla of proof that his daughter's charges are motivated not by actual events but instead by her desire to evade parental supervision"); *DeLawder*, 28 Md. App. at 220 (concluding that appellant was entitled to a new trial because he was denied right to cross-examine victim whether, at the time of the alleged incident, the victim thought she was pregnant by someone else and only accused appellant out of fear of her mother's reaction to her pregnancy). By contrast, Appellant in this case did not highlight a motive H.T. may have had to testify falsely. Instead, he sought to impeach H.T. with evidence relating to her chastity.

Moreover, given that H.T. testified that she kept the abuse by Appellant a secret from everyone, including her childhood friend J.D., the fact that she once told J.D. that

she lost her virginity at 16 to someone else was consistent with her testimony. Thus, we agree with the State that the minimal probative value of the proposed examination was outweighed by its prejudicial nature, and would have subjected H.T. to further pain and embarrassment by probing into unnecessary details of her sexual past.

Ultimately, as with many issues concerning limitations on the right to cross-examine, our standard of review is simply whether the trial court abused its discretion. The Court of Appeals has explained that standard as follows:

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

*McClellan v. State*, 418 Md. 335, 353-54 (2011) (citations omitted).

We are unable to conclude that the trial court abused its considerable discretion in this case. The Rape Shield Statute provides very limited exceptions when a defendant proposes to question a rape and/or sexual assault victim about her own sexual conduct. Given that the statute generally serves as a shield, we conclude that the trial court properly exercised its discretion when it ruled that Appellant could not cross-examine H.T. about whether she told a friend she lost her virginity at a later age to another individual.

**II.**

Appellant challenges the admission of H.T.'s statements to Dr. Northup that occurred during both H.T.'s and Dr. Northup's separate direct examinations. With respect to admission of H.T.'s testimony, Appellant contends these were not properly admissible as prior consistent statements. The State does not respond to this specific argument. With respect to admission of Dr. Northup's testimony, both Appellant and the State argue over whether the evidence was properly admissible as statements for purposes of medical diagnosis or treatment under Maryland Rule 5-803(b)(4).

At trial the court overruled Appellant's objection to Dr. Northup's testimony. Dr. Northup then testified that she was a solo practitioner in adult psychiatry and that part of her practice included talk therapy with patients, as well as prescribing medications for patients as necessary, including when they are referred by therapists who cannot prescribe medications. H.T. was referred to her by Paulette Hurwitz, a licensed clinical social worker, in August 2009. Dr. Northup began the session by asking H.T. generally about her psychiatric and medical history.

Pertinent to this issue, Dr. Northup also asked H.T. about whether there had been any prior abuse in her life. At this, Dr. Northup testified, H.T.'s demeanor became "more distant," and "disassociated." H.T. then told Dr. Northup "that a teacher at her elementary school had sexually abused her over a three year period, from ages 9 to 12." H.T. did not provide any specifics about the abuse. She did, however, indicate that this individual was "kind of [a] family friend, and she said it was someone the family had met through his being a teacher at her school." H.T. also told Dr. Northup that she had

recently told two friends about the abuse. Further, H.T. told her that she thought about the abuse "every day." Dr. Northup also testified that H.T. told her that she did not tell anyone about the abuse, until recently, because she was "very ashamed."

H.T.'s testimony corroborated Dr. Northup's statements. H.T. testified that she saw Dr. Northup at the suggestion of her therapist, Ms. Hurwitz, to get a prescription for medication to treat her anxiety and depression. Dr. Northup asked her during the appointment if she had ever been sexually abused. This was the first time since she had confided in her close friends about the abuse that anyone else had asked her about it. She told Dr. Northup that a family friend had sexually abused her. H.T. also testified that she had a discussion with Dr. Northup who suggested that she tell Ms. Hurwitz about the abuse. H.T., however, felt that because she had been seeing Ms. Hurwitz for so long without disclosing the abuse, she did not know how to tell her.

We hold that H.T.'s trial testimony concerning her statements to Dr. Northup, as well as Dr. Northup's testimony relating to the same, were admissible under the exception to the hearsay rule found in Maryland Rule 5-803(b)(4):

> **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

"'The rationale behind this exception is that the patient's statements are apt to be sincere and reliable because the patient knows that the quality and success of the treatment depends upon the accuracy of the information presented to the physician.'"

*Webster v. State*, 151 Md. App. 527, 536 (2003) (quoting *In re Rachel T.*, 77 Md. App. 20, 33 (1988)); *see also Low v. State*, 119 Md. App. 413, 419 ("The guarantee, rather, was that no one would willingly risk medical injury from improper treatment by withholding necessary data or furnishing false data to the physician who would determine the course of treatment on the basis of that data") (citation omitted), *cert. denied*, 350 Md. 278 (1998). In addition to statements made to a treating physician, "the rationale for the hearsay exception extends to statements made in seeking medical treatment from others such as nurses, orderlies and parents." *Choi v. State*, 134 Md. App. 311, 321 (2000) (quoting 6 McLain, *Maryland Evidence*, § 803(4).1, p. 368 (1987)).

H.T. agreed that she first went to Dr. Northup because she was "looking to get some medication." This suggests that H.T.'s statements were for purposes of diagnosis and treatment, and were not made in contemplation of this action against Appellant. Further, with respect to Dr. Northup's trial testimony, after Appellant objected, the State argued as follows:

> Your Honor, she's going there for treatment or to get medication from her, from Dr. Hurwitz. She's recommended to go to Dr. Northup. She spends time with her for over an hour. Prescribing medication is absolutely a treatment. Assessing a situation, making a diagnosis, and prescribing medication, is treating a patient. It doesn't matter, we're talking about past symptoms. It doesn't need to be exact to the – I believe she diagnoses her, and it's in the notes, with PTSD, with post traumatic stress disorder.
>
> And the portion that the State is seeking to introduce is her past history and that H.T. testified, this was the first time that she was asked directly about the abuse.

The State posits Dr. Northup's testimony was related to the medical reasons H.T. came to see her. Appellant counters, relying on *State v. Coates*, 405 Md. 131 (2008), that

the testimony was inadmissible because of the significant time lapse between the alleged abuse and H.T.'s statements to Dr. Northup. In *Coates*, the underlying acts of alleged abuse occurred approximately one year before they were discovered, while Coates lived with the victim's mother. *Id.* at 134-35. During an interview with a nurse practitioner, Heidi Bresee, the alleged victim, Jazmyne T., said that Coates "put his private inside [her] private," and also asked Bresee, at the end of the interview, if "you are going to go out and find him now?" *Id.* at 138-39. This Court reversed the judgment of the trial court in a reported opinion, concluding that: Jazmyne T.'s statement to Bresee concerning Coates's identity was not "pathologically germane" to treatment; the overall purpose of the interview was investigatory; and, given the time delay between the underlying acts and the interview, and given the fact that Jazmyne T. was not experiencing any medical problems at the time, it was unlikely that Jazmyne T. "would have understood that she was being seen for medical treatment or diagnosis, some fourteen months after the last sexual abuse incident, and three weeks after her disclosure to her mother of what had occurred." *Coates v. State*, 175 Md. App. 588, 627-28 (2007), *aff'd, State v. Coates*, 405 Md. 131 (2008).

The Court of Appeals granted the State's petition for writ of certiorari and affirmed. *Coates*, 405 Md. at 147-48. After noting that Nurse Bresee's interview of Jazmyne T. had both a medical as well as a forensic purpose, and after recognizing that "the existence of dual medical and forensic purposes for an examination [does] not disqualify an otherwise admissible statement under Rule 5-803(b)(4)," the Court of Appeals agreed with this Court's assessment that "the overarching purpose was forensic

in nature." *Id.* at 143. Given Jazmyne T.'s question about locating Coates, as well as the fact that Jazmyne T. was not exhibiting any physical manifestations of abuse when she was interviewed, some fourteen months after the last alleged incident had occurred, the Court of Appeals concluded that Jazmyne T. did not have the relevant state of mind of disclosing the abuse for the purposes of seeking medical treatment to permit her statement to qualify under the exception. *Id.* at 146-47.

The Court noted that this Court had also addressed a dual-purpose statement in *Webster*, *supra*. *Coates*, 405 Md. at 144. The Court stated:

> [T]he court's emphasis, in *Webster*, was on the fact that the victim's statement was "pathologically germane" to treatment by a hospital nurse in an emergency setting. *Webster*, 151 Md. App. at 546, 827 A.2d at 920. We have said that a "pathologically germane" statement is one that falls "within the broad range of facts which under hospital practice are considered relevant to the diagnosis or treatment of the patient's condition." *[Yellow Cab v. Hicks*, 224 Md. 563, 570 (1961)].

*Coates*, 405 Md. at 144; *see also Barnes v. State*, 165 S.W.3d 75, 83 (Tex. App. 2005) (holding that, although alleged abuse had taken place five years earlier, victim's statements made to doctor for diagnosis and treatment related to abuse were not hearsay).

Although the disclosure by H.T. took place years after the underlying sexual assaults, we are persuaded that these statements were properly admissible as they were primarily made for purposes of diagnosis and treatment. Appellant states that H.T. was not experiencing any medical problems at the time she met with Dr. Northup, but both H.T. and Dr. Northup testified that their meeting was for the purpose of treatment and the prescription of medication. Moreover, unlike the situation in *Coates*, there were no forensic aspects to H.T's appointment with Dr. Northup. The testimony demonstrates

that Dr. Northup did not seek information regarding the identity of the abuser or the details of his criminal conduct. Thus, the trial court properly admitted the statements at trial.

**III.**

Appellant also contends the court erred in permitting Dr. Northup to testify because her name was not included on the trial witness list provided to the defense in advance of trial, nor on the voir dire witness list read to the jury. Prior Dr. Northup's testimony, Appellant objected on the grounds that Dr. Northup was not included on the voir dire witness list. After ascertaining that her name was omitted, the State responded that the court could voir dire the jury during trial, and that Appellant would not be prejudiced because "[t]he defense has always been on notice that we intended to call this witness." After argument, the jury entered the courtroom, and the following transpired:

> THE COURT: Good afternoon, ladies and gentlemen of the jury. Before we call the next witness, I just wanted to inquire of all of you, this person's name was inadvertently not mentioned or not listed in the witness list, and her name is Dr. Laurel Northrup [sic]?
>
> [PROSECUTOR]: Northup.
>
> THE COURT: Northup, who is a psychologist and a psycho pharmacologist.
>
> Does any member of the jury know Dr. Northup or have any familiarity with her?
>
> (No response.)
>
> Have you ever heard of her or do you know her?
>
> (No response.)

All right. The record will reflect no affirmative response. Thank you.

The parties agree that Dr. Northup's name was not on the trial witness list. However, the State disputes any claim that Appellant was prejudiced given that Appellant was well aware prior to trial that Dr. Northup was a State's witness. The record supports the State's contention. At a pretrial motions hearing on September 16, 2011, defense counsel acknowledged that the State had provided discovery with respect to Dr. Northup. At that hearing, counsel stated "it's my understanding from the notes there that Dr. Northup saw H.T. after she returned from Ghana in August of 2009, and that H.T. disclosed to her in August of 2009 that she had been sexually abused, allegedly by my client." Counsel continued, "it appears that H.T. met with her again another time in August. It appears that she had not made any disclosures to the therapist she had been with for 10 years at that point, and there [were] discussions about whether or not they were going to therefore tell this new therapist or whatnot."

That same day, the circuit court granted Appellant's motion for a subpoena for tangible evidence and that subpoena directed that Dr. Northup's records for H.T. be sent to the court's chambers. Further, the order provided that counsel for both parties would have access to these records as officers of the court and that further disclosure of those records would be subject to court approval. Trial was continued at Appellant's request, in part, to implement this order. Following this, on February 3, 2012, Appellant filed a written pre-trial motion to exclude the prior statements H.T. made to Dr. Northup.

Maryland Rule 4-263(d), titled "Disclosure by the State's Attorney," requires the State to disclose the witnesses that the State intends to call to prove the State's case in chief or to rebut alibi testimony. Maryland Rule 4-263(d)(3) provides:

> As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-1009 (b), the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged[.]

Although the Maryland Rules require disclosure, they also vest discretion in the circuit court to determine the remedy for failure to abide by Rule 4-263. Maryland Rule 4-263(n) provides:

> 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.

Thus, "[a]s the statutory language suggests, we apply an abuse of discretion standard to a Court's decision whether to strike testimony due to a discovery violation." *Silver v. State*, 420 Md. 415, 433 (2011), *cert. denied sub nom Silver v. Maryland*, 132 S. Ct. 1039 (2012). "'The exercise of [such] discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file.'" *Morton v. State*, 200 Md. App. 529, 542 (2011) (alteration in original) (quoting *Taliaferro v. State*, 295 Md. 376, 390 (1983)).

Furthermore, the exclusion of evidence, though viable as a sanction under Rule 4-263(n), should be used sparingly:

> The Court of Appeals has cautioned that "[e]xclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." Consequently, the general rule is that when "fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." This reflects that discovery sanctions are designed "'to prevent a defendant from being surprised,'" not to "'yield a defendant the windfall of exclusion every time the State fails to'" comply with discovery rules.

*Morton*, 200 Md. App. at 543 (citations omitted). When analyzing the facts to determine appropriate sanction for a discovery violation, "a trial court should consider . . . the existence and amount of any prejudice to the opposing party; . . . the [feasibility] of curing any prejudice with a continuance; and . . . any other relevant circumstances. *Thomas v. State*, 397 Md. 557, 570-71 (2007) (citing *Taliaferro,* 295 Md. at 390; *United States v. Hastings,* 126 F.3d 310, 317 (4th Cir. 1997)).

We discern no abuse of discretion on the part of the trial court. Although it was proper for defense counsel to point out at trial that Dr. Northup was not on the trial witness list, prompting the court's inquiry of the jury, we conclude that Appellant has not shown that the State's failure to name Dr. Northup as a witness prejudiced Appellant so as to warrant our reversal of the trial court's exercise of discretion. This is so especially given that it was clear that, at trial, defense counsel was in possession of Dr. Northup's Evaluation and Treatment Plan for H.T. The trial court properly exercised its discretion on this issue.

## IV.

Finally, Appellant asserts that his cross-examination of Dr. Northup was unduly limited because he wanted to explore H.T.'s psychiatric history. The State responds that it did not open the door to further inquiry on that topic when it asked Dr. Northup whether H.T. told her she had been sexually abused. Further, the State argues that any probative value was outweighed by the danger of unfair prejudice, especially considering the privileged nature of the information Appellant sought to elicit.

Earlier during trial, Appellant indicated that he wanted to explore information H.T. told Dr. Northup, including that she attempted to commit suicide on one occasion, and that she asked her brother to break her leg on another occasion. Appellant contended that, although H.T. was treated as a result of these incidents, she did not make any disclosures about the sexual abuse at that time. Appellant also wanted to show that H.T. used mushrooms, marijuana, and either ecstasy or cocaine. Appellant argued the drug use went to H.T.'s ability to remember and her credibility. The State responded that the suicide attempts and the drug use occurred after she ended the relationship with Appellant. Further, there was no nexus between these incidents and H.T.'s disclosure of the sexual abuse. The court agreed with this latter argument. The court further ruled that the fact that H.T. may have been upset with Appellant did not open the door to evidence concerning her attempts at suicide and that Appellant could not pursue these topics during H.T.'s testimony.

During Appellant's cross-examination of Dr. Northup, the witness agreed that H.T.'s history was pathologically germane to her analysis. Dr. Northup testified that

H.T. told her she was suffering from "culture shock" after returning home from Ghana. She also told Dr. Northup that her parents' divorce when she was 9-years-old as well as mother's disappearance three years later when she was 12 was "traumatic". H.T. also told Dr. Northup that her father's new girlfriend was "difficult", and that her stepsister was considered a "princess" in the household.

Counsel then sought to inquire further about H.T.'s prior psychiatric history, and the State objected. At a bench conference, the State proffered that counsel was about to go into details of H.T.'s psychiatric history, including H.T.'s suicide attempts and PTSD, and that the State had not inquired along those lines during direct examination. The State further argued that it limited its inquiry to whether Dr. Northup was told about the sexual abuse. Defense counsel again responded that the State opened the door to further details about H.T.'s psychiatric history, including the suicide attempts and drug usage by H.T., and that this history was pathologically germane to H.T.'s treatment. The court sustained the State's objection.

We hold that the details of H.T.'s psychiatric history were privileged and that, absent the State's opening the door to such evidence, were inadmissible at trial.[4]

[4] As the Court of Appeals recently acknowledged in relying on its prior decision in *Goldsmith v. State*, 337 Md. 112, 122 (1995):

> With regard to the disclosure of *privileged* records at trial, however, the *Goldsmith* court stated in no uncertain terms that "in order to abrogate a privilege such as to require disclosure at trial of privileged records, a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense." 337 Md. at 133-34, 651 A.2d at 877 (footnote omitted). Moreover, "the required

(Continued…)

Appellant contends that the State opened the door to such evidence by inquiring of Dr. Northup whether H.T. told her that she had been sexually abused. The "open door" doctrine "'is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel.'" *Mitchell v. State*, 408 Md. 368, 388 (2009) (quoting *Conyers v. State*, 345 Md. 525, 545 (1997)). "'If one party has introduced irrelevant evidence, over objection, or, indeed, even 'admissible evidence which generates an issue,' the trial court may rule that the first party has 'opened the door' to evidence offered by the opposing party that previously would have been irrelevant, but has become relevant.'" *Khan v. State*, 213 Md. App. 554, 573 (2013) (quoting *Mitchell*, 408 Md. at 388). However, "[t]his doctrine is narrow, and a response to the issues injected by the adverse party should be tailored appropriately." *Id.* at 574 (citing *Donaldson v. State,* 416 Md. 467, 493 (2010)).

(…continued)

> showing must be more than the fact that the records 'may contain evidence useful for impeachment on cross-examination.'" *Goldsmith*, 337 Md. at 133, 651 A.2d at 876 (citing *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557, 576 (1994)).

*State v. Johnson*, 440 Md. 228, 248 (2014). However, we note that Appellant's argument on appeal is that "because the instant case lacked any physical evidence and was based *entirely* on the word of Ms. T., the court's restriction of Appellant's right to cross-examination was extremely prejudicial." (emphasis in original). This argument establishes that Appellant merely wanted access to the records in order to impeach H.T. For this reason, under *Goldsmith* and its progeny, Appellant failed to show that the records were admissible at trial, and the court was not obligated to allow cross-examination that would have introduced them.

We are not persuaded that H.T.'s suicide attempts or drug usage were either material to a fact in issue in this case or became relevant following Dr. Northup's testimony. Dr. Northup's trial testimony was that H.T. told her that she had been sexually abused by a family friend. Although the suicide attempts and drug usage may have been pathologically germane to Dr. Northup's ultimate treatment plan, the State's elicitation of parts of H.T.'s conversations with Dr. Northup did not open the door to allow Appellant to introduce all aspects of H.T.'s medical and psychological records. The trial court properly exercised its discretion in limiting further cross-examination concerning matters that were otherwise privileged and confidential.

**JUDGMENTS AFFIRMED.**

**COSTS TO BE PAID BY APPELLANT.**