Circuit Court for Baltimore City
Case No. 115307008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1377

September Term, 2017

LENNY EPPS

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: August 9, 2018

On the afternoon of October 10, 2015, Baltimore City police responded to a report of "a naked woman running across rooftops" on Baker Street. The police found A.H.[1] injured, "distraught," wearing "bondages" on her wrists and ankles, and claiming that she had just been raped. A jury in the Circuit Court for Baltimore City convicted Lenny Epps, appellant, of sexually assaulting A.H. while he held her captive. Although Epps claimed that all the conduct during their encounter was consensual, the jury found him guilty of first degree rape, using a deadly weapon to commit a crime of violence, second degree assault, false imprisonment, openly wearing and carrying a dangerous weapon with intent to injure, possession of a regulated firearm after a disqualifying conviction, and openly wearing or carrying a handgun. He was sentenced to life in prison on the rape conviction, plus a consecutive twenty years for using a dangerous weapon in a crime of violence; the remaining convictions were merged for sentencing purposes.

In this Court, Epps contends that the trial court erred in denying his motion under Maryland's rape shield law, *codified at* Md. Code (2012 Repl. Vol.), § 3-319 of the Criminal Law Article, "to admit specific instances of the complainant's prior sexual conduct with [him] and in subsequently limiting [his] cross-examination of the complaining witness." For the reasons that follow, we conclude that the court did not abuse its discretion in denying the motion *in limine* or in sustaining the State's objections during defense cross-examination of the victim.

[1] For privacy, we shall refer to the victim by her initials.

FACTUAL AND PROCEDURAL BACKGROUND

Epps was tried over six days, from May 12-19, 2017. Because he does not contend that the evidence was insufficient to support his convictions, our summary of the lengthy trial record provides context for our resolution of the issues addressed in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

At trial, the State's prosecution theory was that Epps bound, held captive, and sexually assaulted A.H., his girlfriend of three years, before she escaped by fleeing out of a second story window. A.H. testified that these sexual and physical assaults occurred in the upstairs bedroom of a residence she shared with Epps, at 2745 Baker Street in Baltimore. After working an all-night shift at UnderArmour, A.H. returned home on the morning of October 10, 2015, took a shower, got in bed with Epps and greeted him. According to A.H., Epps wanted her to take off work in order to discuss their strained relationship, but she insisted that she needed to sleep before returning to work later that day.

Shortly thereafter, Epps initiated his assault, straddling A.H., placing an icepick against her neck, and telling her, "you're going to take the day off work" and "we do it your way for three years, we're going to do it mine." She recounted the ensuing hours, during which she was stripped, bound with ties and duct tape, forced to drink alcohol, raped, sexually assaulted, and gagged.

During her captivity, Epps used "what appeared to be clothesline rope" to tie her right hand to her right ankle and her left hand to her left ankle. He later added socks and

duct tape to secure these bindings. After Epps forced her to drink a large quantity of vodka, she vomited repeatedly. While she was bound, he repeatedly sexually assaulted A.H. At one point, he also stuffed a sock in her mouth and covered it with duct tape. Throughout this assault, Epps's gun was on the nightstand next to the bed where A.H. was confined.

After hours of captivity and assault, A.H. heard Epps call for delivery of pizza and other food. When the pizza deliveryman called, Epps went downstairs to answer the door. By that time, A.H. had loosened one of her hands enough to remove some of her restraints.

While Epps was occupied downstairs, A.H. fled from the house, naked and still partially tied up, through a bedroom window onto the porch roof. From there, she "start[ed] skipping porches," continuing until she reached the end of the block. At that point, she saw Epps pursuing her over the rooftops. A.H. jumped to the ground, suffering what was later diagnosed as a fractured pelvis. Several people came to her aid, hiding her from Epps, finding clothing for her, calling the police, and remaining with her until they arrived.

The man who delivered the pizza that afternoon, Steven Troxler, testified that while he was at the front door waiting for Epps to pay, he saw a naked lady running over the roof of the porch and jumping to the roof of the house next door. "She had strings hanging from her . . . hands and her legs." When Troxler told Epps there was someone on his roof, Epps went back into the house, returned carrying a gun, paid for the pizza, and shut the door. Troxler later saw Epps on the roof looking in windows, armed with an automatic handgun. Troxler called 911 and followed after the woman, who was getting help from others after jumping to the ground.

Ms. Clarice Howell, who lived at two doors down from Epps at 2741 Baker Street, testified that when she exited her shower that afternoon, she saw a shadow outside her bedroom window. As she got closer, she saw a man, with a bald head and glasses, banging a gun on her window. As the intruder was trying to break into her house, she fled in a towel, out her back door to a neighbor's house, just as she heard her window air conditioner crash to the floor upstairs.

Tammy Garrett-Edwards and other members of a church youth group were driving down Baker Street between 3:00 and 3:30 that Saturday, when Ms. Garrett-Edwards saw a naked woman waving her hands and asking for help. The woman jumped off a roof, with her legs "tied with duct tape and rope." She was "terrified" and kept repeating that "he would kill everybody," that "he was dangerous," and that he "had guns." Ms. Garrett-Edwards testified that she and another man helped the terrified woman by retrieving some clothes for her to wear, from a nearby clothesline. She also saw a large man coming out of a window with a gun in his hand.

Baltimore Police Officer Rene Aguilera, Jr. was responding to a report of "a naked woman running across rooftops," when he encountered A.H. hiding behind a truck. She was "visibly distraught," "seemed confused[,]" and did not "seem to understand what was going on when [the officer] approached her." She "was crying" and "repeating over and over that he's chasing me, he has a gun[,]" and "wincing in pain" after "jump[ing] off a roof[.]" A.H. "had bondages on her right wrist, left wrist" and "right ankle, left ankle." She told the officer that she had "just" been raped and was being chased by her assailant.

Baltimore Police Lieutenant Sean Brown also responded to Baker Street, where he found Ms. Howell, distraught, wrapped only in a bedsheet, and reporting that someone with a gun had broken into her house. At 2745 Baker Street, the lieutenant saw a large man with a black semiautomatic handgun standing in the open doorway. When he saw the officer, the man quickly shut the door. Later, Officer Brown saw the same man with the gun at the upstairs window.

Responding to a call for assistance with a barricaded suspect, a police negotiation team established a perimeter around Epps's house. Baltimore Police Officer Sufian Hassan observed SWAT negotiations with Epps while he was barricaded inside 2745 Baker Street for "at least seven hours." Eventually, Epps surrendered.

Ryan Coley, a forensic scientist with the Baltimore Police Department, examined evidence collected from the victim during a sexual assault forensic examination (SAFE), concluding that it included sperm. Jennifer Bresett, a DNA analyst for the Baltimore Police Department, tested vaginal swabs and a blood card from the same SAFE kit, concluding that Epps was the single source of the male DNA profile from that sample.

The defense theory was that A.H. fabricated her rape claim after consensual sex that involved "role-playing," "vigorous intercourse," and "bondage," because the couple was arguing about each other's alleged infidelities. Epps, age 57 at the time of trial, testified that his sexual relations with A.H. on the day of the incident were consensual. After they engaged in oral sex, she asked him to tie her up, so he used socks, string from the waistband of some pants, and some tape on top of those to bind her wrists and ankles. When she

asked him to cut her loose, he did, and they had consensual intercourse. He denied gagging her, inserting his fingers in her anus, or displaying a gun or icepick. He went out the window after the delivery man told him about the woman on his roof, to find out what was going on, but he denied having a gun. After he returned to the house, he opened the door and saw police with guns drawn, so he retreated in fear of being shot.

We shall add facts as necessary to resolve the issues raised by Epps.

DISCUSSION

Epps contends that the trial court erred in preventing him from presenting evidence of his prior sexual encounters with A.H. Specifically, Epps complains that the trial court abused its discretion in (1) denying his pretrial motion *in limine* seeking permission to pierce the protection of the rape shield law, and (2) sustaining the State's objections during defense cross-examination of the victim, thereby preventing the defense from impeaching her based on her prior sexual conduct with Epps. After reviewing Maryland's rape shield statute, we shall consider each ruling in turn, explaining why we conclude there was no error or abuse of discretion.

Rape Shield Statute

Maryland's rape shield statute provides in pertinent part:

> **§ 3-319. Rape and sexual offense – Admissibility of evidence**
>
> **Reputation and opinion evidence inadmissible**
>
> (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 . . . .

Specific instance evidence admissibility requirements

(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.

(c) Closed hearing. –

(1) Evidence described in subsection (a) or (b) of this section may not be referred to in a statement to a jury or introduced in a trial unless the court has first held a closed hearing and determined that the evidence is admissible.

(2) The court may reconsider a ruling excluding the evidence and hold an additional closed hearing if new information is discovered during the course of the trial that may make the evidence admissible.

Crim. § 3-319.

The Court of Appeals has identified the following test for admission of evidence concerning an alleged rape victim's prior sexual conduct:

> "Evidence of specific instances of the victim's prior sexual conduct" is prohibited unless the evidence clears two hurdles for admissibility. First, the trial court must find at a mandatory, in camera hearing that the evidence is relevant and material and "that its inflammatory or prejudicial nature does not outweigh its probative value." Second, the specific instance evidence must fall within at least one of the four exceptions to the prohibition against evidence of specific instances of the victim's prior sexual conduct.

Shand v. State, 341 Md. 661, 663-64 (1996) (statutory citations omitted).

Restated in terms pertinent to the appeal before us, the rape shield statute excludes evidence of A.H.'s prior sexual conduct with Epps unless such evidence concerns a specific instance that the court, in a closed hearing, determines to be relevant, material to an issue in the case, and not more prejudicial than probative. *See* Crim. § 3-319(b)-(c). The decision of the lower court regarding the relevance, materiality, and inflammatory potential of such "specific instance" evidence lies within its "sound discretion." *See* Smith v. State, 71 Md. App. 165, 182 (1987).

I. Denial of Pretrial Motion *in Limine*

Epps contends that the motions court erred in denying his pretrial motion under Section 3-319 to admit evidence of the complaining witness's prior sexual conduct with Epps. For the reasons that follow, we disagree.

A. Motion Record

Before trial, Epps filed a "Motion to Admit Specific Instances of the Victim's Prior Sexual Conduct," under Section 3-319, requesting permission to elicit evidence that A.H. engaged in consensual bondage and role-playing during sexual relations before their October 10, 2015, encounter. In support, Epps argued that such evidence was relevant and material to establish a consent defense to the charges that he restrained and sexually assaulted her.

At a hearing on April 10, 2017, defense counsel proffered the following factual basis for Epps's motion:

> [DEFENSE COUNSEL]: Mr. Epps and Ms. [H.], the complaining witness in this case, had been involved in a relationship. . . .
>
> The lived together. It was not a short-term thing. . . .
>
> They resided at . . . Mr. Epp's home at 2745 Baker Street, and I don't mean to sound old-fashioned and delicate . . . but the bottom line is this. So their relationship included certain sexual practices. That's where my proffer starts, and without making comment on sexual acts or sexual conduct specifically, the case that will be tried before this Court will involve allegations that the victim was tied by her wrists and ankles and perhaps the left wrist was tied to the left ankle, the right wrist tied to the right ankle, that duct tape was employed I believe possibly to secure these string-like restraints, and then in one instance, I believe actually go over the complaining witness's mouth after a sock had been stuffed in. . . .
>
> And some of that will be contested vigorously, the extent, particularly with duct tape and while someone's airway is blocked by a sock, but, frankly, Your Honor, their sexual history and relationship included I guess acts of bondage, role playing, submissive sex, maybe at times what is sometimes

referred to as rough sex, and I want to say that these two individuals probably had a different type of lifestyle and that's going to come from Mr. Epps.

And the reason why that is important and why it should be admissible is because the State has to prove in many of its counts a lack of consent and . . . that . . . element is attacked by the Defense by introducing these prior consensual acts –

THE COURT: Uh-huh.

[DEFENSE COUNSEL]: -- and **I can't pinpoint to a specific date and time or event. This is, as I indicated, sort of business as usual** –

THE COURT: I understand.

[DEFENSE COUNSEL]: -- but the breakpoint comes and I believe the testimony from the Defense side with some . . . concurrence from the victim is that their relationship had gotten a bit rocky.

THE COURT: Uh-huh.

[DEFENSE COUNSEL]: Each was accusing the other of fooling around with another party, and eventually, Ms. [H.] frees herself from restraints, according to her narrative, while my client is downstairs getting a pizza and French fry and sub delivery and hops out onto the roof of 2745 Baker Street. She's apparently without clothing on, bearing some indicia of the restraints that I alluded to, and she hops from one porch rooftop to the other, comes to an end, and then drops down and of course folks are seeing things and hitting the 911 button, but what is most vigorously contested is this.

Ms. [H.] says that my client said, "We're going to do it my way today." No, this was the way, and there's also an allegation that an icepick was placed to her neck. There's no icepick, I believe, recovered by the officers when they executed a search and seizure warrant. They do find some string or restraint type things and some duct tape. And, again, absolutely no gun. I believe that at some point during this

incident, Ms. [H.] would indicate that a gun was displayed or employed.

I believe what happened was, and this is probably my argument to the jury is, is that the sexual conduct was okay, but there was a flashpoint regarding, "You're cheating on me with this one. No, you're cheating on me with that one," and it got heated and she jumped out the window and the rest is to be played out during the course of trial.

She was examined. Nothing too remarkable about the examination. And I also alluded to an ulterior motive and I'm going to go way out on a limb again because that's another way this can get into evidence perhaps. In developing information, I got an investigator out right now, he's been out, that after my client was locked up, Ms. [H.] continued to live there and was throwing wild parties with a lot of drinking and –

THE COURT: Was that her home before?

[DEFENSE COUNSEL]: No. Well, she was living there with him before the events of October the –

THE COURT: I mean so that was her residence before the date in question? . . .

[DEFENSE COUNSEL]: Yes. And throwing parties, having people in, and finally my client's family . . . said enough is enough and she moved on. **We believe that she was so angry with Mr. Epps that [she] embellished greatly upon what happened, accusing him of rape, a bizarre set of facts, which has partial root in their unique sexual conduct history and that she just wanted . . . . to get him out of the house.**

THE COURT: -- so **your theory, and I'm oversimplifying, but just so that I can understand it for purposes of the motion is that, in essence, the accusation is retribution for what the victim witness felt was cheating by your client**?

[DEFENSE COUNSEL]: I think that's . . . . so well said.

> THE COURT: All right. That's fine. And so I understand that your motion is premised on [3-319] and that **you contend that the evidence of their past consensual relationship including sexual behaviors, as you've described them, is relevant for purposes of demonstrating that . . . to the extent that the jury may consider any physical bondage indicia of a non-consensual act, that your evidence is going to demonstrate to the contrary, that that was standard.**
>
> [DEFENSE COUNSEL]: Precisely.

(Emphasis added.)

The State opposed the motion, pointing to the statutory requirements that "the Defense must offer a specific instance of the victim's prior sexual conduct, and, in addition, the Court must find that the evidence is relevant" and material. The prosecutor argued that "[i]t is not enough to . . . say we generally do these types of behaviors or we like these things. It has to be specific. Even if you cannot point to specific date, it needs to be narrowly tailored because otherwise you're opening the door[.]" Moreover, just "because they engaged in if you want to call it [forcible] sex or rough sex in the past has nothing to do with whether or not she consented to it on that day under these circumstances."

The motions court rejected Epps's "ulterior motive" rationale for admitting evidence of A.H.'s prior sexual conduct with Epps, reasoning that such evidence was not material to the extent it was proffered to establish "that the victim witness's complaint of rape in this case was . . . in retribution for feelings that she had been cheated on." Further, the court pointed out that in most cases,

> what positions we're in or what we do in our bedroom, what we did yesterday, what we did last year isn't relevant under 3-319 and I don't think on its own as a general concept makes it

> an admissible issue for the Defense, but what is unique about this issue here is that the proffered evidence . . . include[s] things that the average person might also connect with incidents of rape, being tied up against one's will, and so . . . perhaps [defense counsel] can get into the specific instance and . . . put on evidence of a specific instance or ask her about . . . the last time that she and Mr. Epps engaged in consensual sex.

As the court recognized, in this case, there was evidence of "the presence of ropes or tape or . . . something that to the average person may indicate being held against one's will" and that defense counsel "wants to put evidence on that these ropes, tape, et cetera, were . . . garden variety bedroom practices." The court then asked the prosecutor why that would "not bear on a material issue, the lack of consent, in this case?" The prosecutor acknowledged that evidence of a specific instance involving bondage or submissive role-playing could be material and relevant and "concede[d] that [A.H.] could certainly be asked about it."

The court agreed that, "because we're talking about a first-degree rape charge in which she and several other . . . witnesses are going to tell the jury she came out of the house wearing indicators of being bound, I think that that issue becomes front and center for Mr. Epps to be able to put on a defense that this was a regular practice for them." The court then asked defense counsel to "address . . . . the issue of the specific instance requirement of 3-319."

Defense counsel responded that he had determined there was no "journal" or "anything like that" to document particular instances of bondage or role-playing. He explained that he planned "to go back and try to develop" whether "there are birthdays,

holidays, parties where all of a sudden something clicked that were memorable to the point that a specific date can be provided," but he could not "say the specific instance occurred multiple times over Labor Day weekend in September of 2015. They did everything." Counsel then speculated that he would not come up with any specific instances "because this was not an out of the ordinary occurrence[.]" Although he stated he was "working on something[,]" counsel anticipated that he was "going to have to rest on that broader claim unless something comes up."

At that point, the court indicated that it would not allow generalized inquiries into A.H.'s past sexual experiences but would allow evidence of specific instances if defense counsel proffered, outside the presence of the jury, relevant evidence that the couple used the type of ties and duct tape seen on A.H. when she left their residence on October 10, 2015.

> So here's where I stand on the issue and . . . **I would encourage Counsel to sort of ask to approach, that we can talk about this very sensitive issue well before we sort of hit that place,** that if [defense counsel] is able to generate what he believes is a specific instance type of evidence question, the issue . . . of Mr. Epps and the victim witness's past use of this type of material that the witnesses are going to say she was viewed with will be admissible.
>
> So to be specific, I think, Madam State, you said that she was seen with rope . . . .
>
> So . . . . **they've got to match up to some extent . . . . [T]he specific instance evidence, I think, needs to answer the State's evidence of what Mr. Epps claims would be viewed by jurors as indicators of being restrained**. . . .

> **It can't be just tossed out there, you know, "You like rough sex, don't you?"** That's not it. It's -- we're talking about the questions of being physically bound because those are – that's the kind of evidence these witnesses are going to say they saw. . . .
>
> I want to be clear . . . . So assuming for the sake of argument that the day of trial comes and the Defense has what it believes is . . . a specific instance type of foundation to go to that place under 3-319. **I will allow evidence that I think fairly answers or opposes the State's evidence, whatever it may be, about what witnesses, including the victim witness, say occurred in terms of was she wearing the rope on her arms or legs, did she have tape or whatever it is. So if there is Defense evidence that it's going to offer to counter that, that also includes indicators of being physically bound, I think that's fair play, but what isn't is, you know, general, "We enjoyed rough sex." It needs to be closely narrowly tailored to answer the State's evidence** because if it doesn't, if it goes farther afield from that, than simply, "We enjoyed a rough bedroom," I think just simply paints a picture of her to a jury without really opposing the State's evidence.
>
> ****
>
> What I'm saying is that **the Defense's evidence to satisfy 3-319 in this instance has to fairly answer or mirror the State's evidence of the type and variety**. So if the State puts on evidence that Mr. Troxler, Ms. Donaldson, Mr. Garrett – I don't know if I'm getting the genders right – identified or saw whom they're going to say is the victim witness after she . . . came out of the house with rope around her right ankle or tape in the bedroom was normal for us and was not not consensual, but rather was consensual, it needs to offer that evidence in a mirror capacity
>
> So evidence from Mr. Epps that he and the victim witness enjoyed rough sex is not going to be admissible . . . . to counter that evidence.

(Emphasis added.)

The court then instructed counsel that "if there's any question about where we are at that moment, please approach." In the event that such evidence "does develop," the court wisely indicated that it would address its admissibility in another closed hearing.

A. Epps's Challenge

Epps contends that "the proffer by defense counsel was more than sufficient to meet the statutory requirements and the evidence should have been admissible." In his view, the motions court erred in requiring the defense to "supply a date and time" for specific instances because "[t]here is simply no reading of the statute that requires the amount of specificity regarding the previous sexual incidents that the court required of the defense," or otherwise mandates that such incidents "exactly 'mirror' the method of bondage at issue in this case."

In support of his construction of the rape shield statute, Epps relies on an out-of-state decision, *Colorado v. Garcia*, 179 P.3d 250 (Co. Ct. App. 2007), characterizing it as "a strikingly similar case" that "reversed the convictions when the lower court erroneously excluded evidence concerning the sexual relationship between the defendant and the complaining witness." In that case, the intermediate appellate court in Colorado held that evidence of prior consensual sex acts, including anal sex, bondage, rough sex, and acting out a rape fantasy, was admissible to support the defense theory that similar acts for which the defendant was on trial were also consensual. *Id*. at 253. The persuasive value of this decision is limited, however, because Colorado's rape shield law establishes a statutory presumption that specific instances of prior sexual conduct are irrelevant, then expressly

exempts from that presumption any "[e]vidence of the victim's or witness's prior or subsequent sexual conduct with the" accused. *See id.* at 254.

In this case, the motions court, applying the correct legal standard under Section 3-319, ruled that any evidence that Epps and A.H. had previously engaged in consensual bondage with submissive role-playing would be relevant, material, and not unduly prejudicial, to the extent such encounters involved the use of restraints like those seen on A.H. when she fled their residence.

Nothing in the hearing transcript suggests the motions court required Epps to provide a pinpoint date for his specific instance proffer. Nor do we agree that the court mandated that the specific instance proffer must "exactly 'mirror' the method of bondage at issue in this case." When read in full and in context, the ruling merely requires the evidence proffered by Epps to "fairly answer or mirror the State's evidence of the type of variety," so that any specific instance evidence would "match up to . . . . the State's evidence of what Mr. Epps claims would be viewed by jurors as indicators of being restrained."

In our view, the motions court properly exercised its discretion in balancing the relevancy, materiality, and probative versus prejudicial conditions prescribed by Section 3-319(b). This Court has "specifically reject[ed] any notion that once consensual sex has been shown, any subsequent sexual activity, *ipso facto*, implies consent[,]" while recognizing that "[t]he sensitive question of the relevancy of the victim's past sexual conduct with the defendant must be decided on an ad hoc basis." *Testerman v. State*, 61

Md. App. 257, 264 (1985). Yet specific instances of prior consensual sexual conduct between the complainant and the accused may be relevant to establish a consent defense when the prior conduct bears factual similarities to the sexual encounter for which the accused is standing trial. In this regard, the Court of Appeals has required that "[p]roffered evidence of past sexual conduct must contain a direct link to the facts at issue in a particular case before it can be admitted." *White v. State*, 324 Md. 626, 638 (1991).

The motions court correctly applied these principles. In considering the Section 3-319(b) conditions of relevancy, materiality, and prejudice, the court required Epps to proffer specific instances of prior sexual conduct that could "fairly answer" the State's undisputed evidence that A.H. was bound hands-to-feet during this sexual encounter. The court appropriately limited consideration of conduct evidence from the former couple's three-year relationship, focusing on sexual encounters that involved bondage and submission by A.H., because only that type of conduct would impeach the prosecution evidence by suggesting that her restraints resulted from a similar consensual encounter rather than an assault.

Given that Epps necessarily had personal knowledge of any such encounters, the proverbial ball was in in his court. And it remained there. Despite his insistence that consensual bondage and submission by A.H. was such a common occurrence as to become "a regular practice for them," Epps never proffered a single instance of such an encounter. Because Epps failed to make even the most basic proffer to satisfy the requirements of

Section 3-319(b), the motions court did not err or abuse its discretion in denying his motion *in limine*.

II. Restricting Defense Cross-Examination

As alternative grounds for reversal, Epps contends that the trial court "unduly limited [his] right to cross-examine the complaining witness" regarding her prior sexual conduct. For the reasons explained below, we are not persuaded that the trial court erred or abused its discretion in sustaining the State's objections to the challenged cross-examination.

A. Trial Record

In support of this assignment of error, Epps points to the following rulings during defense counsel's cross-examination of A.H.:

> [DEFENSE COUNSEL]: How many times did you order him to stop?
>
> [A.H.]: Maybe once, maybe twice.
>
> [DEFENSE COUNSEL]: Do you know what it means to have a safe word?
>
> **[PROSECUTOR]: Objection.**
>
> **THE COURT: Basis?**
>
> **[PROSECUTOR]: Relevance.**
>
> **THE COURT: Sustained.**
>
> ****
>
> [DEFENSE COUNSEL]: Now, as to your ankles –
>
> [A.H.]: Mm-hmm.

[DEFENSE COUNSEL]: a – were there any marks on your ankles to show that your ankles were tied or restrained in a secure manner?

[A.H.]: No. I guess the sock prevented that.

[DEFENSE COUNSEL]: The sock had been placed there so as to prevent that, correct?

[A.H.]: I'm assuming.

[DEFENSE COUNSEL]: Okay. This something new to you?

[A.H.]: Yes.

[PROSECUTOR]: Objection.

THE COURT: Sustained.

****

[DEFENSE COUNSEL]: Now, do you understand what I mean when I use the term roleplaying?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[A.H.]: Yes I do.

[DEFENSE COUNSEL]: You can't answer.

THE COURT: Ms. [H.], when I sustain an objection it means that the question should not be answered.

[A.H.]: Okay.

[DEFENSE COUNSEL]: How about the term bondage. Please, looking at State –

[PROSECUTOR]: Objection.

THE COURT: Sustained.

(Emphasis added.)

A. Epps's Challenge

In Epps's view, the highlighted rulings, sustaining the State's objections, violated his Sixth Amendment right to confront his accuser, because the court prevented him from eliciting evidence that undermined her claim that she did not consent to the bondage and sexual activity that took place on the day in question. Epps cites *Churchfield v. State*, 137 Md. App. 668 (2001); *State v. DeLawder*, 28 Md. App. 212 (1975), and *Connecticut v. Gregory C.*, 94 Conn. App. 759 (2006), as precedent for seeking reversal.

The State counters that Epps failed to preserve his complaints and that, in any event, the trial court did not abuse its discretion in sustaining these objections because defense counsel's questions violated the rape shield statute, by seeking information about prior sexual conduct that was irrelevant, immaterial, and unduly prejudicial.

The Court of Appeals has explained that

> cross-examination is essential to the truth-finding function of a trial. A criminal defendant's right to cross-examine the prosecution's witnesses is protected by the Confrontation Clause that appears in both the federal and State constitutions. "The right of confrontation includes the opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely." That principle is incorporated in Maryland Rule 5-616(a)(4), which provides that "The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at: . . . Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely." To comply with the Confrontation Clause, a trial court must allow a defendant a "threshold level of inquiry"

> that "expose[s] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses."
>
> Once the constitutional threshold is met, trial courts may 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." As Maryland Rule 5-611 provides, a trial court is to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Therefore, although the defendant has "wide latitude . . . the questioning must not be allowed to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion."

Peterson v. State, 444 Md. 105, 121-23 (2015) (citations and footnotes omitted).

Given these standards, a trial court, when

> controlling the course of examination of a witness, . . . may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. **The trial court may also restrict cross-examination based on its understanding of the legal rules that may limit particular questions or areas of inquiry.** Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

Id. at 124 (emphasis added).

In the rulings challenged by Epps, the trial court limited cross-examination under the rape shield statute set forth above. The State cites two reasons that Epps failed to preserve his right to challenge these rulings on appeal. First, the State invokes Md. Rule 5-103, which provides that "[e]rror may not be predicated upon a ruling that . . . excludes evidence unless the party is prejudiced by the ruling, 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." The State asserts that because Epps "did not proffer the substance and relevance of the testimony that was excluded by the court's ruling in any of the instances identified by him as trial court error[,] . . . . [t]his Court . . . . should decline to address this particular claim."

We disagree. Given Epps's pretrial proffers, both by written motion and during oral argument detailed above, we are satisfied that there was a clear context for the defense objections, so that court and counsel had sufficient notice of "the substance of the evidence" that was excluded. Specifically, with respect to defense counsel's questions about whether A.H. understood the meaning of "a safe word," "role-playing," and "bondage," and whether having her ankles tied was "something new to" her, both court and counsel understood that these were inquiries about A.H.'s prior sexual experiences that related back to the defense proffer that the couple's "general practices" included bondage and "rough sex."

We turn next to the State's alternative ground for rejecting Epps's challenge on preservation grounds, which is that defense counsel proffer the evidence in question at a

hearing, as required under Crim. § 3-319(c). The State points out that "the lower court was clear that, if the defense wanted to offer evidence of A.H.'s past sexual conduct, Epps had to alert the court so that a closed hearing could be conducted." Although we view defense counsel's failure to request a hearing before attempting to elicit evidence of A.H.'s past sexual conduct as a failure to satisfy the Rape Shield Law procedural requirement, rather than a preservation issue, we agree that the trial court did not err in sustaining the State's objections for this reason.

As discussed, Section 3-319(c) expressly provides that evidence of prior sexual conduct between the complainant and the accused must be excluded unless there is a closed hearing at which the court makes a determination on the record that the proffered evidence is relevant, material, and not unduly prejudicial. During the motions hearing, defense counsel advised that he did not yet have evidence of a specific instance of bondage, submissive role-playing, or other sexual conduct that would directly rebut the State's evidence that A.H. was wearing such "indicia of restraint" when she fled from Epps. The motions court repeatedly advised defense counsel that if he did develop such evidence, he should notify the court so that the hearing required by the statute could be held outside the presence of the jury. *See* CJP § 3-319(c)(2) ("The court may reconsider a ruling excluding the evidence and hold an additional court hearing if new information is discovered during the course of the trial that may make the evidence admissible.") At trial, the court reiterated those warnings against eliciting evidence of sexual conduct without prior permission,

instructing defense counsel to "come up before you do anything like that so I'll have a better sense of what you mean."

As the excerpted transcript shows, defense counsel failed to heed those warnings or otherwise comply with the statute conditioning the admission of such evidence on a threshold ruling by the court. Because defense counsel's questions sought to elicit evidence of A.H.'s prior sexual experiences as they related to "safe words," rope bindings, "bondage" and "role-playing," the rape shield statute plainly applied. *See* CJP § 3-319(b) ("Evidence of a specific instance of a victim's prior sexual conduct may be admitted . . . only if the judge finds that" it is relevant, material to a fact in issue in the case, not more prejudicial than probative, and pertaining to "the victim's past sexual conduct with the defendant"). In turn, because defense counsel did not obtain a prior ruling that such evidence was admissible, the trial court correctly sustained the State's objections. *See* CJP § 3-319(c).

In response to those rulings, defense counsel did not request a bench conference, much less a closed hearing. *Cf. Miles v. State*, 88 Md. App. 248, 253 (After defense counsel requested a bench conference to ask permission "to question the witness about 'specific instances of past sexual relations with my client,'" trial court held in camera hearing and ruled on request). Based on this record, the trial court did not err or abuse its discretion in sustaining the State's objections.

None of the cases cited by Epps persuade us to reach a different conclusion. In *Connecticut v. Gregory C.*, 893 A.2d 912, 919 (Conn. Ct. App. 2006), the Connecticut

intermediate appellate court reversed a conviction for rape in a spousal relationship, on the ground that the trial court's restrictions on defense cross-examination of the wife regarding the couple's history of sexual role-playing "prevented the defense from presenting evidence that could have shown that the victim consented to having sex with the defendant on the night in question."

In *Churchfield v. State*, 137 Md. App. 668, 680-82 (2001), the trial court foreclosed cross-examination after the defense proffered that the fifteen-year-old complainant fabricated sexual abuse allegations against her father, the defendant, after her parents restricted her activities with two boyfriends with whom she was having sexual relations. This Court held that the proffered evidence regarding the complainant's sexual contact with those two individuals should have been admitted to support the defense claim that she had a motive to falsely accuse her father in order to evade parental restrictions. *Id*. at 682, 688.

In *State v. DeLawder*, 28 Md. App. 212 (1975), the defense proffered evidence of prior sexual conduct by a girl under fourteen who reported that the defendant raped her. Seeking to establish that the complainant had a motive to falsely accuse the defendant, the defense proffered that in the days immediately before and after the alleged rape by the defendant, the complainant told two different peers that she was pregnant by one of two other men. *See id.* at 221-24. This Court held that the trial court abused its discretion by restricting cross-examination regarding the complainant's prior sexual conduct with those two men, because the evidence supported the defense theory that the complainant falsely

accused the defendant in order to avoid telling her mother she "voluntarily had sexual intercourse with others." *See id.* at 226-27.

All three of these decisions are factually, and therefore legally, inapposite, because unlike the rulings in these cases, the rulings challenged by Epps did not prevent him from pursuing a defense based on his prior sexual conduct with A.H. At the motions hearing, the court prohibited only generalized evidence that did not correspond to the events of October 15, 2010, such as broad statements that the couple had "rough sex." As detailed above, the court expressly allowed defense counsel to present evidence that the couple had previously used restraints like the rope and duct tape seen on A.H. The court also recognized that specific instances of submissive role-playing might be relevant, material, and not unduly prejudicial to the extent they suggested that A.H. consented to the sexual acts occurring that day.

Although the court indicated that it would admit evidence of specific instances involving comparable restraints and submissive acts, defense counsel did not proffer such evidence, either at the motions hearing or later at trial. What distinguishes this case from the three cited by Epps is this failure to proffer specific instances of relevant sexual conduct that could be admitted under Section 3-319. At the motions hearing, counsel admitted that he was not aware of any particular encounter involving bondage or submissive role-playing. Although defense counsel stated that he would investigate further before trial, he never again approached the court, either before or during trial, to proffer evidence of such a specific instance.

Instead, counsel attempted to elicit evidence of generalized sexual experiences that the court had already ruled inadmissible. During cross-examination of A.H., the trial court sustained the State's objections to those questions, in accordance with its earlier ruling. Despite that forewarning, defense counsel made no attempt to reframe his questions so as to ask about specific instances of sexual conduct between Epps and A.H. For example, after the State successfully objected to defense counsel's generalized question about whether A.H. understood what a safe word was, counsel did not follow up by seeking the court's permission to inquire whether A.H. and Epps had ever used a safe word during one of their sexual encounters. Nor did defense counsel request leave of the court to ask whether, on a previous occasion, A.H. had agreed to let Epps restrain her while they engaged in sexual acts.

Because Epps failed to proffer any evidence of a specific instance of bondage or submissive sexual conduct with A.H., the trial court did not abuse its discretion in sustaining the State's objections to defense counsel's unauthorized attempts to question A.H. about her "familiarity with alternative sexual practices," "what it means to have a safe word," whether Epps's use of socks and rope as restraints was "something new to" her, and whether she understood "the term roleplaying" and "the term bondage."[2] Moreover, the impact of excluding such evidence during A.H.'s cross-examination was subsequently

[2] We note, moreover, that the court's ruling on the role-playing objection did not prejudice Epps because, although the trial court sustained the State's objection, A.H. nevertheless answered that question, "Yes I do." Because that response was not stricken, the jury was entitled to consider that evidence.

mitigated when Epps testified on direct that on the day in question, A.H. asked to be tied up and they engaged in consensual intercourse following that bondage.

CONCLUSION

We hold that pursuant to Crim. Section 3-319, Maryland's rape shield law, neither the motions court, nor the trial court, erred in excluding evidence concerning the complaining witness's prior sexual conduct with Epps. We, therefore, affirm the judgments of conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.