Circuit Court for Baltimore County
Case No. 03-K-16-3867

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1539

September Term, 2017

DAVID CARRANZA-TOBAR

v.

STATE OF MARYLAND

Graeff,
Arthur,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 24, 2019

Following a bench trial, David Carranza-Tobar, appellant, was convicted in the Circuit Court for Baltimore County of attempted first degree rape, second degree assault, and false imprisonment.[1] The court imposed a sentence of life, all but ten years suspended, for the attempted first degree rape conviction. It merged the second degree assault conviction with the attempted first degree rape conviction for sentencing purposes, and it imposed a concurrent one-year sentence for the false imprisonment conviction.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court abuse its discretion in refusing to strike the testimony of the State's expert witness in forensic sexual assault examination when the State failed to provide notice of the opinions that the expert would offer, as required by Maryland Rule 4-263(d)(8)(A)?

2. Did the circuit court abuse its discretion in refusing to strike the testimony and report of the State's DNA expert when the report did not comply with Maryland Code (2013 Repl. Vol.) § 10-915 of the Courts and Judicial Proceedings Article ("CJP")?

3. Was the circuit court's sentence for attempted first degree rape illegal when the court's actual verdict was guilty of first degree rape, an offense not charged?

For the reasons set forth below, we answer the first question in the affirmative, and therefore, we shall reverse the conviction of attempted first degree rape and remand for further proceedings. We answer the second question in the negative, and therefore, we

[1] Appellant was tried in a joint trial with codefendant Heriberto Rodriguez Gutierrez, who was found guilty on the same counts and received the same sentences.

shall affirm the judgments of the circuit court on the charges of second degree assault and false imprisonment.[2]

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Crime and Investigation

On July 1, 2016, into the early hours of July 2, 2016, the victim, Ms. G., was working at a bar in Baltimore County, Maryland. She testified that, at approximately 12:30 a.m., appellant offered to buy her a drink. It is unclear how many drinks Ms. G. consumed, but there was testimony that she was "drunk, really drunk." After Ms. G. was asked to leave the bar, appellant offered to drive her home, and Ms. G. accepted the offer.[3]

Ms. G. testified that she got into a van with three men, including appellant. She got into the "middle," one man was in a seat behind her, and the other two men sat in the front passenger and driver seats. The man in the front passenger seat then moved to the middle seat where she was located, and the man in the seat behind her covered her mouth. The men hit her in the head and mouth and removed her shoes and underwear as she struggled to get out of the van. Her underwear was around her knees when she lost consciousness. When Ms. G. woke up, her skirt was "all the way up" and one man was on top of her,

[2] Based on our reversal of the first issue, the third issue is moot, and we need not address it.

[3] Alejandrina Polanco, a waitress who was working that evening, testified that she followed Ms. G. out of the bar and offered to take her home, but Ms. G. decided to go with appellant.

"wanting to have sex with" [her]. Ms. G. pushed the man off her, and the men proceeded to shove her out of the van.

Ms. G. went to a nearby house, knocked on the door and asked for help, and the homeowner called the police. The police arrived at approximately 3:00 a.m., and Ms. G. was taken to the hospital, where Ms. Rosalyn Berkowitz, an expert in sexual assault forensic examination, conducted a SAFE exam.[4]

Appellant testified to a different scenario of events. He stated that only he, Ms. G., and Heriberto Rodriguez Gutierrez were in the vehicle. He got into the "middle seat" of the vehicle, a van, and proceeded to lie down. Mr. Gutierrez, with whom appellant had gone to the bar, was in the driver's seat, and Ms. G. was in the "last" seat. Appellant fell asleep, and he woke up to Mr. Gutierrez touching his legs and saying that they needed to get Ms. G. out of the car because she had become "crazy." Together, appellant and Mr. Gutierrez forced Ms. G. out of the van, causing her to fall face down. He and Mr. Gutierrez

[4] Ms. Berkowitz explained the purpose of a SAFE exam at trial:

> The purpose of a SAFE exam is to do a thorough head to toe nursing assessment for the purpose of diagnosis and treatment. A nursing assessment is the basis of everything we do in nursing. In addition[,] we obtain a thorough medical exam, as well as a thorough forensic exam and guide our exam to obtain any residual evidence, as well as address any medical . . . concerns the patient might have.

See also McClanahan v. Washington County Dept. of Social Services, 445 Md. 691, 713 n. 1 (2015) (explaining that the acronym "SAFE" stands for "Sexual Assault Forensic Examinations," and these exams are "conducted by doctors who are SAFE trained and when there is a concern of sexual abuse or assault").

got back into the van, and Mr. Gutierrez dropped him off approximately a block and a half from his home. Appellant went home and went to sleep.

Later that day, after reviewing surveillance video outside the bar and identifying the van outside, the Criminal Apprehension Support Team located the van in question and arrested the two males inside the van. The driver was Mr. Gutierrez; the passenger was not charged. The vehicle was towed to police headquarters, and during a search of the van pursuant to a warrant, the police found Ms. G's phone, wallet, underwear, and shoes. On July 3, 2016, appellant was arrested at his home.

II.

Trial

Trial began on June 20, 2017.[5] Ms. Berkowitz testified as the State's expert in sexual assault forensic examination, and her SAFE report was entered into evidence. The report had diagrams and notes indicating that Ms. G. had bruising, swelling, and abrasions on multiple parts of her body, including multiple bruises on her left thigh near the groin. The report included a statement that no genital injuries were noted. The report did not include any opinions or conclusions.

[5] Witnesses other than appellant and the victim testified at trial, including the detectives involved, appellant's wife, appellant's previous minister, and the security officer employed where Ms. G. works. Because the issues on appeal involve only the testimony of the SAFE nurse, Ms. Berkowitz, and the DNA analyst, Ms. Bemelmans, other witnesses' testimony is included only as necessary to understand the appellate issues.

At trial, Ms. Berkowitz testified that she could conclude, based upon a reasonable degree of medical certainty, that the bruising she found on Ms. G.'s inner thigh was "consistent with finger tip bruising" from "trying to push the thigh[s] apart." She stated that the injuries on Ms. G.'s legs and back were consistent with "road rash," or "blunt force trauma" from portions of her skin "making contact with a rough surface." Ms. Berkowitz also testified that Ms. G.'s injuries were consistent with the history Ms. G. provided her.

Eileen Bemelmans testified as an expert in DNA analysis. She explained that an external genitalia swab from Ms. G. was analyzed and did not reveal any male DNA. A fingernail swabbing from Ms. G.'s right hand, however, produced "a mixture of two individuals." Ms. Bemelmans testified that neither appellant nor Mr. Gutierrez could be excluded as possible matches, and the "evidence profile" was consistent with appellant and Mr. Gutierrez, or someone in their paternal line. [6]

Christina Tran, an expert serologist, tested several vaginal swabs taken from Ms. G. during the SAFE exam. The swabs tested positive for blood, one tested positive for amylase, an enzyme "found in high concentrations in saliva and in lower concentrations in other bodily fluids," and all tested negative for the presence of semen. Ms. Tran explained

[6] At trial, Detective Jessica Hummel testified that she interviewed appellant on July 3, 2016, and at that time, he had scratches on his face and shoulders, which were photographed and entered into evidence as exhibits. Appellant testified that he had been hit in the head by a piece of wood at his job on July 1, 2016, and that explained how he received the facial injuries. His wife stated that, on July 2, appellant scratched his face doing yard work, and the scratches had not been there when he returned from the bar.

that amylase can be found in vaginal fluid, meaning the amylase could have been the victim's. Additionally, the presence of blood on the swabs would not be unusual if the victim was menstruating.[7] Ms. Tran testified regarding other swabs she tested, all of which tested negative for semen.

On July 27, 2017, at the conclusion of the evidence and closing argument, the court rendered its verdict, stating as follows:

> I have over the course of the last five or six days listened very carefully to the testimony of all the witnesses that had testified in this case. I have reflected upon their testimony over the course of the last few hours, and I have reviewed every witnesses[']' credibility and taken into account all of their testimony. I have reviewed the State's exhibits that have been submitted, as well as each of the Defendants' exhibits that have been submitted. I have reviewed the law as it applies to attempted first and second-degree rape, assault in the second-degree, theft in this case under $1,000, and false imprisonment. I have taken into account, I listened very carefully and have considered and taken into account the exceptional closing arguments that were made in this case as well.
>
> After taking everything into account, the Court finds [as] follows: I find that the State has proven beyond a reasonable doubt that as to Count 1, both Defendants are guilty of first-degree rape. I find that the evidence is beyond a reasonable doubt that the Defendants are guilty of second-degree assault, Count 3. Count 4, the State has failed to meet its burden of proof as to Count 4, and I find the Defendants not guilty of theft. Finally, as to Count 5, I find that the State has met its burden beyond a reasonable doubt and find both Defendants guilty of false imprisonment. I did not consider attempted second-degree rape as I believe finding of first-degree rape renders this finding of second-degree rape a nullity. Okay.

The court scheduled sentencing for September 1, 2017.

[7] The report from the SAFE exam conducted by Ms. Berkowitz indicates that Ms. G. told her she was menstruating at the time of the incident.

On July 3, 2017, appellant filed a Motion for Appropriate Relief, requesting that the Court dismiss Counts 1 and 2 on the ground that the verdicts the court rendered on those counts were for substantive rape rather than attempted rape. The court denied the motion, stating, in pertinent part, as follows:

> Clearly when I announced the verdict and failed to say the word "Attempted," it was clearly a misstatement on my part and nothing more. It was my intent to find the Defendants guilt[y] . . . of attempted first-degree rape, and I was convinced beyond a reasonable doubt that they were guilty of attempted first degree rape. Quite frankly, this court never contemplated a charge of first-degree rape.
>
> I have read [*Johnson v. State*, 427 Md. 356, 360 (2012),] and the other cases [including *State v. Prue*, 414 Md. 531 (2010),] and don't find them particularly persuasive in this case. I misspoke and strictly misspoke. . . .
>
> * * *
>
> The docket entry is clear that I found the Defendant[s] guilty of Count 1; attempted first-degree rape, guilty of Count 3; assault, and guilty of Count 5; false imprisonment. The motion is denied.

As indicated, the court sentenced appellant to life, all but 10 years suspended, on the conviction for attempted first degree rape, and it imposed a one-year, concurrent, sentence on the conviction for false imprisonment. This appeal followed.

DISCUSSION

I.

Maryland Rule 4-263(d)(8)(A)

Appellant contends that the circuit court abused its discretion in declining "to strike the testimony of the State's expert witness in forensic sexual assault examination, [Ms. Berkowitz,] because the State did not provide notice to the defense prior to trial of the

opinions she would offer." Specifically, appellant contends that the court "erred when it refused to strike [Ms. Berkowitz's] testimony that fingerprint marks on Ms. [G.'s] inner thighs were caused by hands prying her thighs apart" because this opinion was not provided in the report the State produced in discovery.

The State contends that appellant's objection to the expert testimony is not preserved because counsel did not make the objection "contemporaneously with the testimony at issue," but rather, defense counsel objected to Ms. Berkowitz's testimony only after counsel cross-examined her, one day later. In any event, the State argues that the circuit court "did not err or abuse its discretion in permitting the expert testimony," stating that the impact of the discovery violation was minimal. For the reasons that follow, we agree with appellant and conclude that the circuit court abused its discretion in choosing not to strike Ms. Berkowitz's testimony.

A.

Proceedings Below

Prior to trial, the State advised defense counsel, by letter dated March 16, 2017, that it intended to call Ms. Berkowitz as an expert who would testify consistent with her report, which was provided in discovery. The report states:

> Patient presents to Emergency Department with law enforcement reporting possible sexual assault. Patient is Spanish speaking. Officer Calle is fluent in Spanish and translated for the exam. Exam completed in urgent care room #8. Medically cleared by B. Jackson, PA-C. Patient reports she was drinking at work. She said that she remembers getting into a car with three men for what she thought was a ride home. She stated that they wouldn't let her go, threatened her and physically assaulted her. She said she remembered one of them taking her underwear off of her, but said that

> she passed out and doesn't remember much of what happened. She reports that she was thro[w]n out of the car approx. 50 minutes later. She reported to AA County police who transported her to Wilkins Precinct. Officer Calle brought her to GBMC. Evelyn Kim was present and assisted with the exam as well. SAFE exam completed. Antibiotics and emergency contraception provided per protocol. Discharge instructions reviewed with patient. Officer Calle translated and patient verbalized her understanding. Discharged to home with Officer Calle.

The report included a checklist of items under the heading assault details, including whether there was vaginal or anal penetration or non-genital acts. "Biting" was checked "yes," but most boxes were checked "unsure," and there was a note stating: "Reports she lost consciousness unsure what happened." As indicated, there was a diagram and written notes regarding numerous bruises and abrasions on Ms. G.'s body, but no vaginal injuries.

Ms. Berkowitz testified that Ms. G.'s injuries were consistent with certain causes. When she testified that an abrasion on Ms. G.'s body was consistent with "road rash," appellant did not object, although a conversation between defense counsel that was picked up by the court reporter indicates awareness of the issue raised on appeal.[8] No objection was raised when Ms. Berkowitz subsequently testified that "elliptical" and "circular"

[8] The transcript reflects the following:

> [State]: Now, what does that abrasion look like to you?
>
> [Ms. Berkowitz]: That abrasion is consistent with a form of road rash or the body part being scraped over—
>
> [Mr. Gutierrez's Counsel]: That in the report?
>
> [Appellant's Counsel]: That's not in the report, no.

bruises on Ms. G.'s inner thigh were "consistent with fingertip bruises trying to push the thigh[s] apart."

Counsel did not object to the above testimony until the next day, after extensive cross-examination of Ms. Berkowitz by both codefendants. At that point counsel moved to strike Ms. Berkowitz's testimony because it contained opinions that were not in her SAFE report.[9] The circuit court noted that "none of you objected to the rendering of [Ms. Berkowitz's] opinion when it was given," which counsel for Mr. Gutierrez acknowledged was correct.

The circuit court noted that the letter the State provided, which advised that it would call Ms. Berkowitz as an expert in the field of forensic assault examination, merely stated that she would "testify consistent with [her] report of July 2, 2016." It found that this did not strictly comply with Rule 4-263(d)(8)(A). The court stated, however, "exercise[ing] its discretion," that the letter sufficiently put the defendants "on notice that Ms. Berkowitz would be testifying as to the cause of the injuries." Accordingly, the court ruled that it would not strike her testimony, although it stated that it would "not consider necessarily her expert opinion that the injuries were caused by being thrown out of a car."

B.

Preservation

We address first the State's contention that this issue was not properly preserved for appellate review. As the State notes, appellant's counsel did not object to the testimony

[9] Counsel for Mr. Gutierrez made the motion, which counsel for appellant joined.

when it was given on direct examination, but instead waited until Ms. Berkowitz had been extensively cross-examined. Under these circumstances, the contention arguably is not preserved for appellate review. *See* 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 addressing this issue, however, it is helpful to keep in mind the purpose of the preservation requirement. As the Court of Appeals has explained, the purposes of the preservation rules are:

> "(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation."

Fitzgerald v. State, 384 Md. 484, 505 (2004) (quoting *County Council v. Offen*, 334 Md. 499, 509 (2004)).

Here, as appellant notes, the objection raised on appeal was raised and discussed during trial, and the circuit court did consider and rule on the issue. Under these circumstances, in this bench trial, we will exercise our discretion to address the issue on the merits.

C.

Analysis

Maryland Rule 4-263 governs discovery in the circuit court. "The purpose of the Rule is 'to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense.'" *Bellard v. State*, 229 Md. App. 312, 341 (2016) (quoting *Jones v.*

State, 132 Md. App. 657, 678 (2000)), *aff'd*, 452 Md. 467 (2017). *Accord Thomas v. State*, 397 Md. 557, 567 (2007). "[T]he scope of pretrial disclosure requirements under Maryland Rule 4-263 must be defined in light of the underlying policies of the rule." *Williams v. State*, 364 Md. 160, 172 (2001).

Rule 4-263(d)(8)(A) provides:

> (d) Disclosure by the State's Attorney. Without the necessity of a request, the State's Attorney shall provide to the defense:
>
> * * *
>
> (8) Reports or statements of experts. As to each expert consulted by the State's Attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion.

Here, as indicated, the circuit court found that the State did not strictly comply with this rule. It then addressed whether exclusion of Ms. Berkowtiz's testimony was a proper remedy for this discovery violation.

"The remedy for a violation of the discovery rules is . . . 'within the sound discretion of the trial judge.'" *Raynor v. State*, 201 Md. App. 209, 227–28 (2011) (quoting *Williams v. State*, 364 Md. 160, 178 (2001)), *aff'd*, 440 Md. 71 (2014), *cert. denied*, _ U.S. _, 135 S.Ct. 1509 (2015).

> Rule 4-263(n) provides a list of potential sanctions, including: ordering discovery of the undisclosed matter, granting a continuance, excluding evidence as to the undisclosed matter, granting a mistrial, or entering any other appropriate order. The rule "does not require the court to take any action; it merely authorizes the court to act." *Thomas v. State*, 397 Md. 557, 570 (2007). Thus, the circuit court "has the discretion to select an appropriate

> sanction, but also has the discretion to decide whether any sanction at all is necessary." *Id.* (citing *Evans*, 304 Md. at 500).

Id. at 228.

In exercising its discretion regarding whether to impose sanctions for discovery violations, "'a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances.'" *Id.* (quoting *Thomas*, 397 Md. at 570–71). The court may decide that no sanction at all is necessary, and if the court decides to impose sanctions, it "should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas*, 397 Md. at 571.

We review a circuit court's decision regarding the imposition (or not) of sanctions for an abuse of discretion. *Bellard*, 229 Md. App. at 340. *Accord Williams*, 364 Md. at 178. An abuse of discretion "occurs when a judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of law." *Williams v. State*, No, 13, September Term, 2018 (January 18, 2019), slip op. at 8 (quoting *Campbell v. State*, 373 Md. 637, 666 (2003)).

Appellant asserts that the circuit court abused its discretion in failing to strike Ms. Berkowitz's testimony that bruises to Ms. G.'s inner thigh were the result of a person attempting to pry open Ms. G.'s legs. He asserts that there was no indication of such a conclusion in the report provided, there was no reason given why that opinion was not provided in discovery, and the "prejudice to the defense was significant" because, "other

than the word of Ms. G., who was highly intoxicated, there was no evidence that a sexual assault was attempted."

The circuit court, after finding that there was not strict compliance with the discovery rules, found that the State's letter regarding Ms. Berkowitz's testimony put appellant on notice that she "would be testifying as to the cause of the injuries." We agree with appellant, however, that there was no notice that Ms. Berkowitz would opine that bruising on Ms. G. was consistent with fingertips trying to push her thighs apart. We also agree that this testimony, of which appellant had no notice, was prejudicial in this case, where the discovery provided indicated that the victim: "Reports she lost consciousness unsure what happened." That this evidence was critical to the State's case against appellant is evidenced by the State's repeated reference in closing argument to Ms. Berkowitz's testimony in this regard.

Under the circumstances of this case, we conclude that it was an abuse of discretion for the circuit court to decline to strike Ms. Berkowitz's undisclosed opinion that the bruises on Ms. G.'s inner thigh were "consistent with fingerprint bruising" from "trying to push the thigh[s] apart."[10] Accordingly, we reverse appellant's conviction for attempted first degree rape.[11]

[10] The court indicated that it would exclude a different undisclosed opinion, stating that it would "not consider necessarily her expert opinion that the injuries were caused by being thrown out of a car." It is not apparent why the court would exclude that opinion, but not the other, more prejudicial opinion.

[11] As indicated, our holding on this issue renders the third issue, involving the sentence for attempted first degree rape, moot.

II.

Appellant next contends that the circuit court "abused its discretion when it refused to strike the report and testimony of the State's DNA expert, [Ms. Bemelmans,] because her report failed to comply with the word or spirit" of CJP § 10-915. Appellant argues that, once the circuit court determined that the report failed to comply with CJP § 10-915, thus barring it from automatic admission, the circuit court was required to hold a *Frye-Reed* hearing, which the court failed to do.

The State contends that appellant's claim that he was entitled to a *Frye-Reed* hearing because the report did not comply with CJP § 10-915 is waived because appellant's counsel "specifically rejected the opportunity for a *Frye-Reed* hearing" at trial. In any event, the State argues that the circuit court "did not err in concluding that [Ms.] Bemelmans' report was admissible under [CJP] § 10-915." For the reasons discussed below, we agree with the State.

A.

Proceedings Below

As indicated, *supra*, Ms. Bemelmans, an analyst with Bode Cellmark Forensics, performed DNA testing of a sample taken from Ms. G.'s fingernail. After comparing this sample with samples obtained from appellant and Mr. Gutierrez, she concluded that they could not be excluded as possible contributors of the Y-STR profile obtained from the sample taken from Ms. G.

Ms. Bemelmans' report included the following statement:

> Testing performed for this case is in compliance with accredited procedures under the laboratory's ISO/IE 17025 accreditation issued by ASCLD/LAB. Refer to certificate and scope of accreditation for Certificate Number ALI-231-T.

This statement was provided to appellant and Mr. Gutierrez prior to trial, along with a disk listing the DNA lab's accreditations.

Prior to Ms. Bemelmans' testimony, counsel moved to preclude her testimony, arguing that the report did not comply with CJP § 10-915.[12] Specifically, they asserted that the report did not include a statement from the testing laboratory that its analysis had been validated by one of the institutions listed in the statute, or by the standards promulgated by the FBI.

The State argued that the lab where Ms. Bemelmans worked was a "certified accredited lab," and the "disk provided to counsel from [the lab]" had the lab's certifications "and what they comply with." The State further asserted that the lab in question was "an accredited lab that complies with the FBI's requirements." Accordingly, the State argued that the report complied with CJ § 10-915. If the circuit court found to the contrary, however, the State argued that the primary remedy would be to hold a *Frye-Reed* hearing.

[12] Maryland Code (2013 Repl. Vol.) § 10-915 of the Courts and Judicial Proceedings Article was amended while this case was pending. 2016 Md. Laws ch. 570-71. The amendments "apply only prospectively and may not be applied or interpreted to have any effect on or application to cases involving offenses that were committed before the effective date of this Act." 2016 Md. Laws ch. 570 § 2. The amendments took effect October 1, 2016, and the events of this case occurred on July 2, 2016. 2016 Md. Laws ch. 570 § 3. As such, unless otherwise specified, citations to CJ § 10-915 are to the version of the statute that existed prior to the October 1, 2016 amendment.

Counsel for Mr. Gutierrez disagreed that the remedy was to have a *Frye-Reed* hearing. He argued that the statutory requirement is a condition precedent to admission of the report or testimony in connection with the report.

Counsel for appellant agreed with this analysis, stating:

> [I]t's a simple matter of statutory construction. The statute says if you want to have a witness testify regarding this report, then the report must say, A, B, C. It's just statutory construction, and it's not there, so they have not complied with the statute. Also, we're not going to contest whether DNA evidence is scientifically reliable within our relevant communities. We know that, but that's not the only standard for getting it in.

The circuit court found that, because the report did not include a statement indicating the DNA analysis had been validated by one of the organizations found in the statute, the DNA evidence was not automatically admissible. The court decided, however, to hold a hearing to "determine whether or not procedures under the laboratory's ISO/IEC 17025 accreditation issued by ASCLD/LAB [were] in accordance with those organizations listed in the statute," stating that, if they were, they would "fall within [§] 10-915 and w[ould] be admissible."

During the hearing, Ms. Bemelmans testified that the lab where she worked was accredited by the American Society of Crime Laboratory Directors and the Laboratory Accreditation Board, and that the lab complied with the FBI's Quality Assurance Standards ("QAS") for Forensic DNA testing laboratories. She stated that, if the lab did not comply with the QAS, its accreditation would be "suspended or, I guess, placed on hold." Following this testimony, the circuit court ruled that Ms. Bemelmans' report and testimony

was admissible because the lab was in accordance with the standards set forth in CJP § 10-915.

B.

Preservation

Initially, we agree with the State that appellant waived his appellate argument that the court erred in not conducting a *Frye-Reed* hearing. As discussed, *supra*, not only did appellant fail to request such a hearing, he specifically argued that a *Frye-Reed* hearing was not the proper response if the report did not qualify for automatic admission. Instead, appellant argued that, based on "a simple matter of statutory construction," the State had not complied with the statute, and therefore, the report and Ms. Bemelmans' accompanying testimony should be excluded. Under these circumstances, we agree with the State that this issue is not preserved for this Court's review. *See Howard v. State*, 232 Md. App. 125, 168, *cert denied*, 453 Md. 366 (2017) ("The burden was on the defense to request a *Frye-Reed* hearing. Having failed to do so, [the appellant] cannot complain on appeal that the trial court erred by not holding such a hearing.").

C.

CJ § 10-915

Even if the issue had been preserved for review, we would find it to be without merit. "In Maryland, scientific evidence can become admissible either by statute, 'if a relevant statute exists,' or by establishing general acceptance in the relevant scientific community under *Frye-Reed*." *Phillips v. State*, 451 Md. 180, 189–90 (2017) (quoting

Armstead v. State, 342 Md. 38, 54 (1996)).[13] A relevant statute exists for DNA evidence. CJ § 10-915 provides that "DNA evidence is admissible so long as certain notice requirements are met and the analysis is accompanied by '[a] statement from the testing laboratory setting forth that the analysis of genetic loci has been validated by standards established by TWGDAM or the DNA Advisory Board.'" *Id.* at 190 (quoting CJ § 10-915 (1998) (amended 2016)). There is no argument here that the notice requirements were not met; the only argument addresses the requirement of a statement that the analysis has been validated by the requisite standards.

In *Phillips*, 451 Md. at 197–98, the Court of Appeals provided a thorough explanation of the purpose of CJ § 10-915, explaining that the intent was "to eliminate the need for *Frye-Reed* hearings for every piece of DNA evidence" and provide that "DNA evidence is automatically admissible, so long as certain conditions are met." *Id.* at 197. Because the science of DNA analysis quickly evolves, the General Assembly "delegate[d] the power to approve new DNA analysis techniques to two national standards-setting

[13] As this Court explained in *Howard v. State*, 232 Md. App. 125, 167 n.11 (2017):

> "A *Frye-Reed* hearing is conducted in Maryland courts to determine whether expert testimony is admissible." *Carter v. Wallace & Gale Asbestos Settlement Tr.*, 439 Md. 333, 354 n.10 (2014). "The name is derived from two cases, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), where th[e] standard of general acceptance in the relevant scientific community was first articulated, and *Reed v. State*, 283 Md. 374 (1978), where we adopted the *Frye* Standard." *Blackwell v. Wyeth*, 408 Md. 575, 577 n.1 (parallel citations omitted).

bodies: TWGDAM and the DNA Advisory Board," reasoning that, "if a new technique was good enough for approval by one of these two entities, then it was good enough for automatic admissibility in Maryland Courts."[14] *Id*. at 198.

"In 1999, TWGDAM was renamed the Scientific Working Group on DNA Analysis Methods or "'SWGDAM,'" and in 2000, "the DNA Advisory Board expired at the end of its statutory term and transferred its responsibility for recommending revisions to the QAS to SWGDAM." *Id.* at 200. As such, neither of the standards-setting bodies mentioned in CJ § 10-915 existed when the events which led to the trial in *Phillips* occurred.

The Court of Appeals held:

> The Statute does not require that either of these entities remain in existence at the time the procedures are validated, or when the analysis is performed. As long as the laboratory's procedures have been validated by standards previously established by one of these entities, and the analysis is performed in accordance with those validated procedures, then the analysis qualifies for automatic admissibility under the Statute.

[14] "TWGDAM was a group of private and public sector forensic scientists convened by the FBI in 1988 to establish guidelines for DNA testing in forensic laboratories throughout the country." *Phillips v. State*, 451 Md. 180, 198 (2017). "The DNA Identification Act of 1994 authorized the creation of the DNA Advisory Board to develop and revise, as appropriate, 'recommended standards for quality assurance, including standards for testing the proficiency of forensic laboratories, and forensic analysts, in conducting analyses of DNA.'" *Id.* at 199 (quoting 42 U.S.C. § 14131(a) (1994)). The DNA Identification Act also provided that, "'[u]ntil such time as the advisory board has made recommendations to the Director of the Federal Bureau of Investigation and the Director has acted upon those recommendations, the quality assurance guidelines adopted by the technical working group on DNA analysis methods [(TWGDAM)] shall be deemed the Director's standards.'" *Id.* (quoting 42 U.S.C. § 14131(a)(4)). Pursuant to the DNA Identification Act, the FBI director established the DNA Advisory Board. *Id.* The DNA Advisory Board then "issued two sets of standards for forensics laboratories to follow." *Id.* Collectively, they are known as the FBI's Quality Assurance Standards ("QAS"). *Id.* at 199–200.

> Although the QAS are not explicitly mentioned in the DNA Admissibility Statute [CJ § 10-915] (before the 2016 amendments), they are literally "standards established by . . . the DNA Advisory Board."

Id. at 203. Accordingly, in *Phillips*, the Court held that a statement asserting that the DNA analysis had been validated according to the QAS satisfied the requirement under CJ § 10-915.

Here, the report provided by Cellmark Bode analyst Eileen Bemelmans stated: "Testing performed for this case is in compliance with accredited procedures under the laboratory's ISO/IEC 17-025 accreditation issued by ASCLD/LAB." The court found, and the State does not dispute, that this statement did not satisfy the statute.

Ms. Bemelmans, however, subsequently made a "statement," albeit in testimony, that the lab followed the QAS. Appellant cites no authority that the "statement" required by the statute must be made in writing in the initial report. *See Robinson v. State*, 151 Md. App. 384, 396–97 (2003) (When defendant challenged admissibility of DNA profile under §10-915, the circuit court allowed DNA profile to be automatically admitted when the State "responded with a copy of a letter from [the laboratory that produced the profile] that the tests had been so validated."). Under these circumstances, we cannot conclude that the circuit court erred or abused its discretion in admitting the DNA report and accompanying testimony.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.