Circuit Court for Montgomery County
Case No. 130336

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1560

September Term, 2017

WESLY SAINT FLEUR

v.

STATE OF MARYLAND

Berger,
Fader,
Thieme, Raymond G., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: November 14, 2018

Appellant, Wesly Saint Fleur, was convicted by a jury in the Circuit Court for Montgomery County on June 29, 2017, of child sex abuse, three counts of second-degree rape, three counts of third-degree sex offense and one count of fourth-degree sex offense. He was sentenced to fifteen years' imprisonment for child sex abuse and to fifteen years' imprisonment for one of the second-degree rape counts, to be served consecutively. Appellant was further sentenced to concurrent sentences for the remaining counts and five years of probation upon release.

Appellant presents the following questions for our review,

> 1. Did the trial court err in admitting evidence of A.R.'s statement to the SAFE nurse?
>
> 2. Is the five-year period of probation illegal?

For the reasons discussed below we conclude that there was no error in admitting A.R.'s statement. The five-year period of probation, however, must be struck.

BACKGROUND

The victim, A.R., a minor who was 16 years old at the time of the trial, testified that she lived in Gaithersburg, Maryland at her uncle's home with her family, including her uncle and his wife, her two cousins, her sister, her mother and stepfather. [T. 6/27/17 at 43, 45.] A.R. also indicated that her uncle's wife's nephew and his friend, appellant, also resided in the dwelling. [T. 6/27/17 at 46.] A.R. shared a room with her sister. [T. 6/27/17 at 48.]

A.R. testified that in the spring of 2016, appellant began touching her inappropriately. [T. 6/27/17 at 48]. A.R. explained that when she had just turned 15 years

old, appellant started getting "closer," "nicer . . . more involved" in her life. [T. 6/27/17 at 49–50]. A.R. described an event where appellant pulled her by the wrist into her mother and stepfather's bedroom in the basement of the house, locked the door and sat with her on the bed, saying he would not hurt her. [T. 6/27/17 at 50–52]. According to A.R., appellant instructed her to lie down on the bed and then he proceeded to remove her sweatpants, pull her underwear to the side and then inserted his fingers into her vagina. [T. 6/27/17 at 52]. A.R. testified that she "froze" and appellant began to slide his fingers in and out of her vagina. [T. 6/27/17 at 52]. She stated that she began to "mov[e] around" trying to "slide from there" and "push his arm." [T. 6/27/17 at 53]. Appellant then removed his fingers from A.R.'s vagina and she curled up by the headboard, in a state of shock, and did not speak. [T. 6/27/17 at 53]. According to A.R., appellant then "wiped his fingers on his pants," returned her sweatpants to her and asked her if she was going to go back upstairs. [T. 6/27/17 at 53]. A.R. testified that she took her pants and went up to her bedroom, lied on her bed, and began crying. [T. 6/27/17 at 53–54]. After the incident, appellant asked A.R. if she enjoyed what happened and if she felt "okay," to which A.R. did not respond. [T. 6/27/17 at 54]. Appellant told A.R. not to tell anyone about what happened, to "keep it a secret," and that she would not "want this to happen to anybody else" if she told. [T. 6/27/17at 54–55]. A.R. testified that she experienced lingering pain inside and outside of her vagina after the incident. [T. 6/27/17 at 55]. She stated that she did not tell anyone because she was "scared" that "if he could easily do it to [her], then he [could] do it to . . . [her] little sister or [her] cousin[.]" [T. 6/27/17 at 55–56].

A.R. testified that just before she left for a trip to Florida, appellant raped her for the first time. [T. 6/27/17 at 68–72]. According to A.R., appellant was asking her whether she was a virgin. [T. 6/27/17 at 66]. A.R. testified as follows:

> I kept saying, like that's none of your business. Don't start this. It's none of your business. Don't worry about me. And he was like, geez, I'm just asking questions, like I can't ask questions. And I was like, not about that, just like don't, don't worry about me, just stop worrying about me.
>
> And that's when he was like, I can show you how it, what it feels like. And I was like, I don't want to know what it feels like, I'm already, I'm already sick of, sick of everything else, like I'm, I, I don't want to know what that feels like. And he's like, he was like, it's not, it's going to hurt at first, but it won't hurt after a while. And I was like, no, I'm fine, like just leave me alone, I'm fine.
>
> And that's when he's like, let me just show you how it feels like. And then he got on top of me, and he like put his body on top of my body, so like he was kind of life crushing me and I couldn't move, and I was like, and I started like breathing really hard. I was like, it's fine, I don't want to know what it feels like. I don't want to know what it feels like. He was like, it won't hurt, I promise, it won't hurt that much.
>
> And that's when, that's when he pulled my underwear to the side, and that's when he stuck his penis inside my vagina.

[T. 6/27/17 at 68–69].

A.R. described an immense amount of pain; she "froze" because she had "never felt that kind of pain before." [T. 6/27/17 at 69]. According to A.R., appellant asked if she was ok and she responded in the negative. [T. 6/27/17 at 69]. She attempted to push him away and appellant got off of her and withdrew his penis from her vagina. [T. 6/27/17 at 69].

A.R. testified that the next incident with appellant occurred on the morning of August 17, 2016. [T. 6/27/17 at 56]. According to A.R., she was lying on the sofa watching TV in the living room and appellant came from the basement and joined her in the living room, sitting next to her on the sofa. [T. 6/27/17 at 56]. Appellant moved closer and closer

to her, and began trying to talk with her. [T. 6/27/17 at 57]. Appellant then encouraged A.R. to join him down in the basement, to which A.R. responded that she did not want to and that she was "comfortable" in the living room. [T. 6/27/17 at 57]. A.R. testified that appellant got up and stood by the sofa where her feet were. [T. 6/27/17 at 57]. A.R. moved her feet up to her body and appellant sat down and began "playing" with the blanket and A.R. asked him to stop. [T. 6/27/17 at 57–58]. According to A.R., appellant then "crawled" on top of her and moved the blanket up to reveal her body from the waist downward. [T. 6/27/17 at 58]. He then moved her long nightshirt upward, revealing her underwear and moved them to the side and inserted his fingers into her vagina. [T. 6/27/17 at 58]. A.R. stated that she "froze" but asked him to stop and told him that she didn't "want to do this anymore." [T. 6/27/17 at 58]. A.R. testified that appellant stated he wasn't going to hurt her, then pulled his pants down, moved her legs open and penetrated her vagina with his penis. [T. 6/27/17 at 58–59]. A.R. described a lot of pain when appellant penetrated her. [T. 6/27/17 at 59]. At first appellant did not do anything, but remained still, then, according to A.R., he began to slide in and out of her vagina. [T. 6/27/17 at 60]. After a time, he stated that they should move to "someplace more comfortable" and he picked A.R. up, "threw" her over his shoulder and took her to her bedroom. [T. 6/27/17 at 60–61]. Appellant placed A.R. onto her bed and re-penetrated her vagina with his penis, beginning to slide in and out. [T. 6/27/17 at 61–62]. A.R. described appellant as being on top of her, his chest on her own, and that he was licking her neck and breasts. [T. 6/27/17 at 62]. A.R. testified that she did not say anything to appellant but cried. [T. 6/27/17 at 62].

Appellant then withdrew his penis from A.R.'s vagina and, according to A.R., she got up and began to tidy the bed because she did not want her younger "sister to come home to a messy bed." [T. 6/27/17 at 63]. A.R. testified that appellant stated he was not finished and he picked her up again, took a tube of Vaseline from her room and carried her across the hall to his room. [T. 6/27/17 at 63]. Appellant placed A.R. on the bed, applied Vaseline to his penis and the "outskirts" of A.R.'s vagina, i.e., her vulva, and once again penetrated her vagina with his penis, sliding in and out. [T. 6/27/17 at 63]. A.R. stated that she began to loudly and continually scream. [T. 6/27/17 at 64]. Appellant attempted to quiet her, stating that the neighbors would hear her, but when A.R. did not stop screaming, he withdrew his penis from her vagina, pulled up his pants and exited the room. [T. 6/27/17 at 64]. A.R. testified that she sat on the bed for a moment and then ran into her room, grabbed her phone, and went into the bathroom. [T. 6/27/17 at 64]. She removed all her clothes and placed them on the toilet, turned on the shower and the air vent to make "noise," locked the door and called her mother. [T. 6/27/17 at 64]. A.R.'s mother told her to call the police, which she did. [T. 6/27/17 at 73]. A.R. emerged from the bathroom after the police arrived. [T. 6/27/17 at 74].

A.R. testified that she was later at the police station, with her family, and she spoke to two detectives about the incident and answered questions. [T. 6/27/17 at 74–75]. After the police station, A.R. went to the hospital where she was examined in a "forensics office." [T. 6/27/17 at 75].

On cross examination, A.R. testified that, prior to the instances of sexual assault, appellant had shown her photographs of a naked female minor that he had on his phone.

[T. 6/27/17 at 105–106]. Although appellant had told A.R. not to tell anyone about the pictures, when confronted by her mother, A.R. admitted to having seen the photographs, but did not disclose that appellant had shown them to her. [T. 6/27/17 at 106–107]. A.R.'s uncle confronted appellant about the photographs, but, according to A.R., appellant denied he possessed them. [T. 6/27/17 at 107].

A.R.'s uncle testified that A.R. lived at his home along with his wife, two daughters, his sister (A.R.'s mother), A.R.'s sister, his sister's boyfriend, his nephew, his wife's daughter's sister, and appellant. [T. 6/27/17 at 116]. He testified that at the time of the incident, appellant was 22 years old and had been living at the home for approximately five years. [T. 6/27/17 at 116]. A.R.'s uncle also confirmed that on August 17, 2016, after he left for work, only appellant and A.R. remained in the house. [T. 6/27/17 at 118].

A.R.'s phone call made to 911 was admitted into evidence and played for the jury. [T. 6/27/17 at 122–123]. During the call, A.R. identified herself, stated that she had "been hurt so bad" by appellant, identified as "Wesly," that it had "been happening for a while" and that, "after today, [she] just c[ould]n't take anymore." [T. 6/27/17 at 125–126]. When asked by dispatch if she needed medical attention, A.R. responded in the affirmative. [T. 6/27/17 at 127].

Office Scott Koogle testified that he responded to the 911 call, arriving after other officers were already on the scene. [T. 6/27/17 at 131–132]. Police footage from August 17, 2016 was admitted into evidence during his testimony and played for the jury. [T. 6/27/17 at 140]. On the video, Montgomery County Police Officer Romano spoke with appellant at the house and asked him to tell A.R. to exit the bathroom. [T. 6/27/17 at 143–

44]. When appellant informed Officer Romano that A.R. would not leave the bathroom, Office Romano went upstairs and asked A.R. to exit the bathroom and, when she did, he interviewed her about what happened. [T. 6/27/17 at 143–44]. Officer Koogle testified that, "based on the facts and statements made," appellant was placed under arrest and transferred to the special victims' station. [T. 6/27/17 at 145].

Janet Rabon, a sexual assault forensic examiner ("SAFE") nurse at Shady Grove Medical Center, testified that she met and examined A.R. on August 17, 2016 in the Forensic Medical Unit at the Medical Center. [T. 6/28/17 at 22]. Rabon testified as follows:

> So, my predominate reason for being called to the hospital is I'm a health care worker, so, she was, she presented for sexual assault. And, you know, my, that's what I explained to her, you know. We would go through the health care side of that and also the forensic piece.

[T. 6/28/17 at 26].

Rabon further testified that she explained to A.R. that they "would go through the different medications that she could benefit from from having intercourse" and "antibiotic treatment . . . to prevent sexually transmitted infections, medications that could prevent pregnancy," etc. [T. 6/28/17 at 26]. According to Rabon, A.R. elected to take all medications offered. [T. 6/28/17 at 27]. Rabon explained that A.R. was ruled out for additional "scans or labs" other than those for STD and pregnancy screening. [T. 6/28/17 at 27]. Rabon also explained that an interview had to be conducted before the examination and, "that based on what [they] discussed during her interview," Additional medical treatments were deemed unnecessary. [T. 6/28/17 at 28].

During her testimony, Rabon's report was admitted into evidence as State's Exhibit #10. [T. 6/28/17 at 33]. The circuit court overruled appellant's objection to the admission of the report, stating the following:

> With respect to the statement of the alleged victim in this case, I do find that there is an exception of the hearsay rule. Not only just medical records but for those statements themselves for purposes of medical diagnosis or treatment. Although they may be in part part of a forensic exam, it's clear based on the testimony that I heard that it would be reasonable in discussing medication and other aspects including taking a history and the like. That it is for purposes of treatment and that's why those statements were made[.]

[T. 6/28/17 at 29].

Appellant, however, asserted:

> There's a whole section of the exact same testimony what I consider an accident is her testimony that she never has (unintelligible) and that testimony, she's the victim reporting she was raped earlier that morning by someone, where, the basement. All this other stuff is not necessary for her to do the forensic exam or treat her.

[T. 6/28/17 at 30].

The State responded that the statement would also go to "psychological treatment" and Rabon would be required to recommend "follow-up treatment" in that area. [T. 6/28/17 at 31].

In admitting the report containing A.R.'s statements to the SAFE nurse, the court noted that, "history can be important in terms of treatment and that history was given in terms of treatment." [T. 6/28/17at 31].

Rabon continued her testimony concerning the statement A.R. made to her during the narrative portion of the SAFE examination:

> She said the time he assaulted her was when she had just turned 15. That he had maybe four to six times since that point. That he was living in the home, he was a friend of her cousins. That on that day, she thought she was alone in the house and sitting on the sofa watching television. That he came in and sat next to her. She had a blanket on her lap and he reached under the blanket to try to remove her underwear and she said please don't do that. And he said look how hard you're making me. He threw the blanket on the floor and got on top of her. He held her down with his arm across her chest. She was crying and begging him to stop. He said that since you can't be quiet we're going to go somewhere else. And he put her, he carried her up the stairs to his room. While he put her on his bed and held her down again. He put, he penetrated her vagina with his fingers first and then his penis. She was crying and saying ow because it hurt. So, he got off of her. He went to look for Vaseline, she tried to leave the room at that point and he stopped her and got back on top of her. He used the Vaseline, then he, to lubricate his penis. And then he penetrated her vagina. He held her down, he was kissing her on the neck and breasts. He was also licking her. Then he got off and said let's go downstairs and turn off the TV so that we can hear anyone coming in. And that point she ran out of the room and went into her room, tried to lock him out but he was able to push his way back in, push his way into her room. He got on top of her again and penetrated he[r] vagina again. She was crying and screaming and squirming and so he got off and she ran into the bathroom and locked the door and called her mother and her mother told her to call the police.

[T. 6/28/17 at 35–36]. Rabon also testified that A.R. stated that appellant told her that if she told anyone, "he would do the same thing to her little cousin and little sister." [T. 6/28/17 at 37].

Rabon next testified that after the narrative, she swabbed A.R.'s mouth and then they took a break. [T. 6/28/17 at 38]. They finished some paperwork and discussed medication options and then Rabon administered medication to A.R. based on their discussion. [T. 6/28/17 at 38]. State Exhibit #10 indicates that Rabon began taking the A.R.'s medical history and history of the assault on August 17, 2016 at 5:35 p.m. [State Exhibit #10 at 3]. The report also indicates that Rabon began the general physical

examination of A.R. on the same day at 8:00 p.m. and completed the examination the same day at 8:35 p.m. [State Exhibit #10 at 8].

Catherine Roller, a supervisor of forensic casework at Bode Cellmark Forensics, testified that the neck swabs, breast swabs and the first vaginal swab, all obtained from A.R. during the SAFE examination, tested "positive for male DNA." [T.6/28/16 at 112]. Additionally, Roller testified that a sample taken from appellant's underwear yielded a DNA profile that reflected a mixture of DNA matching both appellant and A.R. [T.6/28/16 at 113].

The forensic case report was submitted into evidence and concluded that appellant could not be excluded as a possible contributor to the neck swab and the first vaginal swab and no conclusions could be made about the breast swab. [State Exhibit #25 at 3]. The report further noted that A.R. could not be excluded as a possible contributor to the DNA mixture profile obtained from the swab of appellant's underwear. [State Exhibit #25 at 3].

Appellant testified that he was living at the house with A.R. at the time of the incident. [T.6/29/16 at 8]. He denied having sex in anyway with A.R., touching, raping, fondling her, or kissing her breasts or neck. [T.6/29/16 at 8]. According to appellant, on the morning of August 17, 2016, A.R. opened the door to his bedroom and asked why he wasn't at work. [T.6/29/16 at 8]. He replied that he was working later and she left his room, shutting the door. [T.6/29/16 at 8]. Appellant then testified that he saw her later in the living room; he was in the laundry room next to the living room taking his clothes out of a bag and placing them in the washing machine. [T.6/29/16 at 10–11]. Appellant stated that while he had a conversation with A.R. in the living room, he denied having any kind of sexual

contact with her at that point. [T.6/29/16 at 11]. According to appellant, he then went upstairs to his room, unplugged his Xbox, went back downstairs, played video games with A.R., then unplugged his Xbox and returned to his room alone. [T.6/29/16 at 11–12]. He denied having any physical contact with A.R. and stated that he did not see her again until after the police arrived at the house. [T.6/29/16 at 12–13].

On cross examination, appellant testified that approximately 10 minutes after he came back upstairs, he heard a scream in the bathroom. [T.6/29/16 at 21]. According to appellant, he knocked on the door and when A.R. did not answer, he returned to his room. [T.6/29/16 at 21–22]. Appellant testified that he did not call for help. [T.6/29/16 at 22].

Later, when questioned about being a possible contributor to the DNA discovered on A.R.'s neck and inside of her vagina and A.R. being a possible contributor to DNA discovered in his underwear, appellant could not explain why that would be. [T.6/29/16 at 32–33]. When questioned about the pictures of a naked female minor on his phone, appellant testified that he had lied about possessing the pictures. [T.6/29/16 at 20]. Appellant explained that when confronted in the car about the photos, he denied having them "because [he] did not want to say it while there were other kids in . . . the car." [T.6/29/16 at 19].

DISCUSSION

I.

Appellant first contends that A.R.'s statements made to the SAFE Nurse, Ms. Rabon, were hearsay. These statements were later recounted in Rabon's in-court testimony and in hospital records admitted as State's Exhibit #10. Appellant asserts that "[t]he record

cannot support the conclusion that A.R. understood that the purpose of her statement to Rabon describing the alleged assault was for medical diagnosis or treatment." Specifically, appellant argues that it is unclear in the record when Rabon discussed medication with A.R. and, therefore, it is unclear "whether A.R. understood, at the time she made her statement to Rabon, that her statement would be used for medical diagnosis or treatment and not solely for forensic purposes."

Appellant further asserts that the form authorizing examination at the Forensic Unit at Shady Grove Medical Center further illustrates that A.R. did not understand her examination with Rabon was for medical diagnosis or treatment because the form describes a medical exam completed by a medical doctor and a forensic exam completed by a forensic nurse.

Appellant also argues, alternatively, that even if portions of A.R.'s statement were relevant for her diagnosis and treatment for purposes of Rule 5–803(b)(4), they were not "pathologically germane" and, therefore, inadmissible. According to appellant, "[t]he 'pathologically germane' standard that is applicable when determining the admissibility of medical records under the business records exception is also applicable to statements by alleged victims of sexual assault to SAFE nurses." Citing *State v. Coates*, 175 Md. App. 588, 627 (2007), appellant argues that, "[u]nder that standard, 'only entries in medical records that are pathologically germane, i.e., relevant to the patient's diagnosis or treatment, fall within the business records exception to the hearsay rule."

Finally, appellant contends that error in admitting the statement was not harmless.

The State responds that the trial court properly exercised its discretion when it admitted A.R.'s statements to the SAFE nurse into evidence. According to the State, A.R.'s statements, recounted in Rabon's testimony and the hospital records, "were admissible under the hearsay exception for statements made to a medical provider in contemplation of treatment." The State maintains that the record illustrates there was a dual purpose to the examination with the SAFE nurse and, that A.R. understood that there was a medical purpose for the exam.

Appellate courts

> review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard. Review of the admissibility of evidence which is hearsay is different. Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.' Md. Rule 5–802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law[.] (Emphasis in original).

Thomas v. State, 429 Md. 85, 98 (2012) (quoting *Bernadyn v. State*, 390 Md. 1, 7–8 (2005)).

"For questions of law, we 'undertake an independent review of the legal correctness of the [c]ircuit [c]ourt's ruling, without according it any deference.'" *Hartman v. State*, 452 Md. 279, 288–89 (2017) (quoting *Oku v. State*, 433 Md. 582, 593 (2013)).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5–801(c). However, a witness's testimony concerning words spoken by another person is not automatically relegated to the realm of hearsay. "The threshold questions when a hearsay objection is raised are (1) whether the declaration at issue is a 'statement,' and (2)

whether it is offered for the truth of the matter asserted." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017) (quoting *Stoddard v. State*, 389 Md. 681, 688–89 (2005)).

Rule 5–802 provides that, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." In other words, there may be exceptions to the hearsay rule that will permit its admittance into trial evidence.

One such exception to the hearsay rule recognized in Maryland is for statements made for purposes of medical diagnosis or treatment, as provided for in Rule 5–803(b)(4). The Rule states that such hearsay will be permissible if the

> [s]tatements [are] 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.

In regards to this hearsay exception, the Court of Appeals has noted that such testimony is admitted because "the underlying rationale [is] that the patient's statements . . . are apt to be sincere when made with an awareness that the quality and success of the treatment may largely depend on the accuracy of the information provided[.]" *Candella v. Subsequent Injury Fund*, 277 Md. 120, 123–24 (1976).

While "[t]he hearsay exception 'extends to statements made in seeking medical treatment from others such as nurses[,]'" *Coates v. State*, 175 Md. App. 588, 616 (2007) (quoting *Choi v. State*, 134 Md. App. 311, 321 (2000)), it "does not apply to statements made to nontreating medical personnel." *Id.* "The rationale for the distinction is that . . . 'the trustworthiness which characterizes the declaration is no longer assured, since the

patient is aware that the statements are being received primarily to enable the physician to prepare testimony on his behalf rather than for purposes of diagnosis or treatment." *State v. Coates*, 405 Md. 131, 142 (2008) (quoting *Candella*, 277 Md. at 124).

"For this reason, courts must separately examine both the reason that a medical provider asked the sexual assault victim to describe the assault, and the victim's subjective purpose in making the statement." *Webster v. State*, 151 Md. App. 527, 537 (2003). Therefore, "[o]nly statements that are both taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes fit within the Rule 5-803(b)(4) hearsay exception." *Id.*

This Court has noted that there is a possible exception to this rule in instances where statements made by a sexual assault victim describing the assault are statements made for the "dual purpose" of medical treatment and for forensic reasons. *Id.* at 545. "If the challenged statement has some value in diagnosis or treatment, the patient would still have the requisite motive for providing the type of 'sincere and reliable' information that is important to that diagnosis and treatment." *Id.* at 545–55.

In *Webster*, *supra*, we noted that "a hospital nurse trained in both emergency care and sexual assault forensic examination treats and forensically examines a child immediately following a sexual assault, . . . [may] solicit[] a description of the incident." *Id.* at 546. "In these circumstances, the victim's statement may be 'pathologically germane' to any injury or disease that the victim may have suffered in the assault." *Id.* As we observed, "what happened to a sexual assault victim may be critically important in deciding where to examine her, what range of medical problems to look for, and, ultimately, how to

treat her." *Id.* We reiterated, however, that the statement must still have been "both taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes [in order to] fit within the Rule 5-803(b)(4) hearsay exception." *Id.* at 537.

In the instant case, the main thrust of appellant's argument is that the record cannot establish that A.R. knew there was a medical purpose for the forensic exam and, therefore, her statements to the SAFE nurse are inadmissible. Specifically, appellant points to A.R.'s testimony, noting the lack of an affirmative statement that she understood there to be a medical purpose to the forensic examination as well. Appellant also argues that "[t]he record is unclear . . . as to when the discussion about medications took place, that is, whether that discussion took place before or after A.R. told Rabon about the assaults."

As the State points out in its brief, State's Exhibit #10 illustrates that Rabon's notes about A.R.'s statements indicate that Rabon spoke with A.R. about the assault at 5:35 p.m. on August 17, 2016. The same report notes that the examination began at 8:00 p.m., on the same date, and lasted 35 minutes. Here, the record shows that A.R.'s statements to Rabon occurred before the examination. The record and Rabon's testimony illustrate that discussions about medication took place after the interview.

Furthermore, it is not required that A.R. have testified in the affirmative that she understood there was a medical purpose to the forensic examination. The law only requires that statements be "both taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes." *Webster*, 151 Md. App. at 537. When A.R. presented herself for examination at the Shady Grove Medical Center, she was confronted with a form that provided her three options: whether she wanted only a medical examination,

anonymous reporting, or standard reporting. The inference being one could obtain a medical exam only, or a medical exam with the option to report anonymously or to report in the standard manner. A.R., fifteen years of age at the time, selected the third option. Appellant argues that the third option's statement, "a complete forensic exam by a forensic nurse will be completed" precludes A.R.'s understanding that any statements she made to Rabon would be used for medical purposes, as well as forensically. We disagree. Appellant's logic would mean that any and all examinations by a SAFE nurse would only ever be for forensic purposes in cases where there was also a separate medical examination. This is a false assumption. The facts in this case illustrate that there was a dual purpose for Rabon's examination of A.R. The fact that A.R. had a separate medical examination by a doctor does not automatically mean that there was no medical purpose to Rabon's examination.

Moreover, we agree with the circuit court that A.R.'s understanding of the medical purpose for the exam "can be shown to the [c]ourt's satisfaction by the testimony of the provider." [T. 6/28/17 at 29]. As the court noted, Rabon "indicated exactly what she was doing [and] why she was doing it[.]" [T. 6/28/17 at 29]. Rabon testified that she discussed with A.R. that they "would go through the health care side . . . and also the forensic piece." Rabon discussed testing for sexually transmitted diseases and medications appropriate for A.R. Additionally, certain medical treatments were ruled out for A.R. based on the examination. Therefore, we agree with the State that the record does support the trial court's ruling that A.R.'s statements to Rabon were admissible under Rule 5-803(b)(4). The statements were given, at least in part, in the contemplation of medical treatment or

medical diagnosis for treatment purposes.

Appellant next argues that, assuming portions of A.R.'s statement were relevant for medical treatment or diagnosis, other portions were not pathologically germane and, therefore, inadmissible. In his brief, appellant reproduces large portions of Rabon's testimony recounting A.R.'s "assault narrative" and the Shady Grove medical records, italicizing much of both and stating that those portions "are not relevant to A.R.'s diagnosis or treatment and, therefore, are not pathologically germane."

The State responds that appellant has failed to preserve this argument for our review. According to the State, appellant's trial counsel failed to "make known to the court which statements he was referring to" when making his objection and, therefore, has not preserved this argument for our review. We disagree.

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). In accordance with Rule 4-323(a), appellant's trial counsel made the following objection:

> There's a whole section of the exact same testimony what I consider an accident is her testimony that she never has (unintelligible) and that testimony, she's the victim reporting he was raped earlier that morning by someone, where, the basement. All this other stuff is not necessary for her to do the forensic exam or treat her. I would say (unintelligible).

(T. 8/28/17 at 30).

The State suggests that, at trial, appellant's trial counsel should have articulated each and every sentence that he found irrelevant to A.R.'s medical treatment or diagnosis. However, counsel did object to all the "other stuff" not pertaining to A.R.'s report of being

raped that day. The State does not contend that, on appeal, appellant is diverging from the challenged statements in Rabon's report and testimony. Accordingly, we hold that the issue has been preserved for our review.

Responding to appellant's contention that portions of A.R.'s statement are not relevant and therefore not pathologically germane, the State counters that the information provided was necessary for A.R.'s medical treatment and diagnosis. At trial, the State noted that the statement would "also go to . . . psychological treatment" and that the nurse was also recommending "follow-up treatment." [T. 6/28/17 at 31]. The circuit court noted that a patient's "history can be important in terms of treatment" and that, in this case, A.R.'s "history was given in terms of treatment." [T. 6/28/17 at 31]. We agree. An understanding of a patient's history would enable a medical provider to make a fully-informed decision and any recommendations concerning that patient's physical and psychological medical treatment or diagnosis. Therefore, we remain persuaded by appellant's argument and find no error in the admission of the SAFE nurse's testimony and report.

II.

Appellant's final contention is that his five-year period of probation is illegal "because no portion of any of the sentences was suspended." Appellant requests that the case be remanded to the circuit court for resentencing. The State responds that, "Saint Fleur is entitled to have his probation order struck and his docket [entries] and commitment order amended accordingly."

Md. Code Ann., Crim. Proc. § 6–211 governs the suspension of sentence or probation after judgment and provides that, "[o]n entering a judgment of conviction, the

court may suspend the imposition or execution of sentence and place the defendant on probation on the conditions that the court considers proper." The statute

> permits the court to suspend the execution of a sentence and place a defendant on probation on such conditions as the court considers proper. When, however, no part of the execution of a sentence is suspended, the imposition of a period of probation is without effect.

Gatewood v. State, 158 Md. App. 458, 482 (2004).

In *Costello v. State*, 240 Md. 164, 167 (1965), the Court of Appeals stated that, "in its original sentences . . . the trial court gave definite terms of confinement, no part of which were suspended. Absent a suspension of sentence, the language as to probation had no meaning[.]" The Court further noted that, "Maryland law authorizes probation only before verdict or upon the suspension of sentence." *Id.* at 167. Accordingly, when no part of any of the sentences imposed by the court is effectively suspended, an "order for probation is of no effect." *Gatewood*, 158 Md. App. at 482.

In the instant case, all agree that no part of appellant's sentence was suspended. After reviewing the record, we hold that the order of probation is without effect because no part of appellant's sentence was suspended.

In *Gatewood, supra*, this Court remanded the case to the circuit court clerk with direction to "make the appropriate docket entries, to amend the commitment order and to strike the order for probation." *Id.* at 483. We see no reason to act differently in the instant case. Therefore, the case will be remanded to the clerk for the Circuit Court for Montgomery County with direction to make the appropriate docket entries, amend the commitment order and to strike the order for probation. .

CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY WITH DIRECTION TO AMEND THE DOCKET ENTRIES AND COMMITMENT ORDER, CONSISTENT WITH THIS OPINION, AND TO STRIKE THE ORDER FOR PROBATION; JUDGMENTS AFFIRMED IN ALL OTHER RESPECTS; COSTS TO BE PAID BY APPELLANT.