Circuit Court for Baltimore City
Case No. 116245008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1832

September Term, 2017

DARYELL MACK

v.

STATE OF MARYLAND

Wright,
Friedman,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: March 19, 2019

Convicted by a jury, sitting in the Circuit Court for Baltimore City, of second-degree assault and of second and fourth-degree sexual offenses, Daryell Mack, appellant, presents three questions for our review, which actually amount to five. They are:

1. Did the circuit court err in admitting into evidence a SAFE report, prepared by a forensic nurse, containing the victim's "narrative complaint"?

2. Did the circuit court err in admitting into evidence photographs of the victim's genitals?

3. Did the circuit court err in admitting into evidence testimony from a nurse that the victim's "narrative complaint" and the photographs of the victim's genitals were "consistent"?

4. Did the circuit court err in admitting into evidence the results of DNA testing that were "inconclusive"?

5. Did the circuit court err in allowing the prosecutor, during closing argument, to inform the jury that he introduced inconclusive DNA results because he did not want the jury to think that he was "trying to hide anything" and that said results could "neither include nor exclude appellant as having any sort of contact" with the victim?

Finding no error, we affirm.

BACKGROUND

At trial, the victim, T.S., testified that she and appellant were friends, who occasionally met to watch movies or "get something to eat." On the night of July 27, 2016, T.S. met appellant at his place of business, a print shop in Baltimore City, to watch a movie there. After the movie ended, appellant picked T.S. up and started "kissing on [her] stomach and pulling on [her] pants." T.S. immediately demanded that appellant put her down. When appellant refused to do so, she "started like trying to punch him in his

shoulders." Then, appellant pulled T.S.'s pants down, "started performing cunnilingus" on her, and inserted his fingers into her vagina and anus, while T.S. was "scratching, punching, biting" to "get him off."

When appellant finally "stopped," T.S. pulled her pants back up and asked appellant to call her a ride so she could leave. T.S. then exited the print shop, followed by appellant, who implored her to "come back in." But, when she re-entered the shop, appellant pinned her against a wall and started "grabbing at [her] clothes." He then once again pulled T.S.'s pants down and "performed cunnilingus." When appellant was finished, T.S. left the shop and went home, where she showered. The next morning, T.S. called the police, who ultimately transported T.S. to Mercy Medical Center in Baltimore, where Maria Nana, a forensic nurse examiner, administered a Sexual Assault Forensic Examination ("SAFE") and then prepared what is known as a "Safe report" based on that examination.

DISCUSSION

I.

Appellant contends that the circuit court erred in admitting into evidence the SAFE report prepared by Nurse Nana, as it contained T.S.'s "narrative complaint", which, in appellant's view, constituted inadmissible hearsay. That narrative read as follows:

> Patient states: "We were watching a movie in his office. I was sitting on the floor then he picked me up. I ended up on the floor and he started pulling my pants and then he started performing oral sex on me and put his fingers in my vagina first and anus. I was trying to fight him off the whole time. He's a big guy. I elbowed him in his neck, puched [sic] him in his back, scratched him in his arms, legs, neck, and I think I bit his thigh and his hand. He just stop and I put my clothes on. I walked to the store, he was supposed to call me a ride. While waiting for a ride, he put his head on my lap like he

> is talking to my vagina and did oral sex again. After that, he stop and he called me a ride."

The State responds that this claim of error is not preserved because appellant's "general objection" to the admission of the SAFE report at trial "did not put the court on notice that he was objecting to part of an otherwise admissible exhibit," or seek, we note, a redaction of the narrative complaint at issue either before or after the SAFE report was admitted. The State further contends that, even if preserved, appellant's claim is without merit because T.S.'s narrative was made for the purposes of medical diagnosis or treatment, and such statements are expressly admissible under a well-established exception to the rule against hearsay.

We agree that appellant's claim was not preserved for appellate review. When, as here, a piece of evidence is generally admissible but may contain objectionable material, trial counsel has an obligation to bring such objectionable material to the trial court's attention. *See Haile v. Dinnis*, 184 Md. 144, 153 (1944) ("After evidence has been admitted, and an application is made to the court to exclude it, then the onus rests upon the party making the application, to confine his objection to that portion of the evidence which is illegal.") (internal citations and quotations omitted). In other words, the trial court is "neither expected nor required to search the [evidence] and sift out the objectionable material." *State Roads Commission v. Creswell*, 235 Md. 220, 229 (1964); *See also Belton v. State*, 152 Md. App. 623, 634 (2003) (finding no error where the defendant objected to portions of an otherwise admissible audio tape but did not seek redaction or even raise the

issue at trial). Thus, appellant's objection to the admission of the SAFE report, because it contained T.S.'s "narrative complaint" was not preserved for appellate review.

But, even if preserved, appellant's claim is without merit. "'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). Although hearsay is generally not admissible, *See* Md. Rule 5-802, it may be admitted into evidence if the statement "falls within a narrow exception provided by rule, statute, or constitutional provision." *Dulyx v. State*, 425 Md. 273, 284 (2012).

Maryland Rule 5-803(b)(4) provides such an exception for statements "made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment." "The rationale underlying this particular exception is that 'the patient's statements to his or her doctor 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 the physician.'" *State v. Coates*, 405 Md. 131, 141 (2008) (citations omitted). What is more, "[t]he exception specifically contemplates the admission of statements describing how the patient incurred the injury for which he is seeking medical care." *Griner v. State*, 168 Md. App. 714, 745 (2006) (citations and quotations omitted). And, more particularly, "a sexual assault victim's statement describing the assault may be admissible under Rule 5-803(b)(4), even though it

was taken and given for dual medical and forensic purposes." *Webster v. State*, 151 Md. App. 527, 545 (2003).

T.S.'s narrative complaint was such a statement. It described the assault for which she, as "a sexual assault victim," was seeking treatment, and "was taken" by a forensic nurse and "given for dual medical and forensic purposes." Indeed, Nurse Nana testified that one of her purposes in examining T.S. and preparing the SAFE report, which included the narrative at issue, was to provide medical care. Accordingly, we hold that T.S.'s narrative complaint fell within the hearsay exception provided by Rule 5-803(b)(4) and, therefore, was properly admitted.

II.

Appellant contends that the circuit court erred in admitting into evidence photographs of the victim's genitals, which Nurse Nana had taken while administering T.S.'s SAFE examination. The photographs were of no relevance, asserts appellant, because Nurse Nana testified that the photographs "showed no genital injury" and because, in appellant's view, "no photograph was necessary to support any of SAFE Nurse Nana's testimony. And, even if the photographs were relevant, they should not have been admitted, he adds, as they "were far more prejudicial than probative" and served no other purpose than "to humiliate and embarrass T.S. by unnecessarily putting her genitals on display and, therefore, to unfairly inflame the jury's sensibilities against [appellant]."

Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence," Md. Rule 5-401, though such evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. In "determin[ing] whether a particular piece of evidence is unfairly prejudicial," we "balance the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 705 (2014). But, we have stressed, "[w]hat must be balanced against 'probative value' is not 'prejudice' but, as expressly stated by Rule 5-403, only 'unfair prejudice.'" *Newman v. State*, 236 Md. App. 533, 549 (2018). That is to say, "[t]o justify excluding relevant evidence, the 'danger of unfair prejudice' must not simply outweigh 'probative value' but must, as expressly directed by Rule 5-403, do so 'substantially.'" *Id.* at 555. And "[t]his inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

First of all, the photographs were relevant. Before their admission, Nurse Nana testified that, although the pictures did not depict "any genital injuries to [T.S.]," they were "consistent with digital penetration of [T.S.]'s vagina." The nurse went on to explain that, in some of the pictures, "there is a hole," apparently referring to the vaginal opening, "where digits can come through." She then observed that, in several other pictures, a hair could be seen "embedded" in T.S.'s "vagina wall." Those photographs were, opined Nurse Nana, "consistent with digital penetration" because, as she explained, "for a foreign body," that is, a hair, "to go or stay inside an orifice or vaginal wall," the vaginal wall needed to "be penetrated from the outside." And other photographs, according to the State, "showed

that [T.S.'s] public hair, which was short and tightly curled, did not look like the hair that was found in [her] vagina." Thus, the photographs were relevant because they tended to corroborate T.S.'s testimony that appellant had inserted his finger into her vagina during the assault in question.

Moreover, defense counsel implicitly confirmed their relevance when she questioned Nurse Nana about the presence of the hair, suggesting that it may have been inserted in T.S.'s vagina by T.S. herself or by Nurse Nana during her examination. However, on redirect, Nurse Nana laid to rest either possibility by testifying that the hair could not have come from her examination and that it was "too deep for someone penetrating themselves."

As for appellant's claim that the photographs were unfairly prejudicial, the State counters that that argument was not preserved for our consideration because, when the issue of the photographs was brought to the court's attention, defense counsel merely stated that she was objecting to their admission because they had "no material value." The State further contends that, even if that argument was preserved, the photographs were not unfairly prejudicial because, "the jury was unlikely to be inflamed by the photographs or to convict [appellant] where it would otherwise find the evidence lacking."

We agree with the State that this issue was not preserved. As the State correctly notes, defense counsel objected to the admission of the photographs solely on the grounds that they were of no material value. At no point did defense counsel indicate that she was objecting because the photographs were prejudicial. Accordingly, that issue is not properly

before us. *See Gutierrez v. State*, 423 Md. 476, 488 (2011) ("[W]hen an objector sets forth the specific ground for his objection … the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.") (citations and quotations omitted).

Finally, even if the issue was preserved, we conclude that the photographs' probative value was not substantially outweighed by the danger of unfair prejudice. To begin with, appellant's claim that the photographs served "no purpose" other than to humiliate T.S. is without merit. As noted, the photographs were relevant in that they supported T.S.'s account of the assault. Moreover, it is hard to imagine how photographs of T.S.'s genitals prejudiced appellant. As noted by the State, "if the jury was put off by the fact that the photographs were unnecessarily humiliating and embarrassing, the jury would no doubt [have held] it against the prosecutor who admitted the photographs, not [appellant]." Accordingly, the circuit court did not abuse its discretion in admitting the photographs.

III.

Appellant next contends that the circuit court erred in admitting into evidence testimony from Nurse Nana that the victim's "narrative complaint" and the photographs of the victim's genitals were "consistent." According to appellant, Nurse Nana's testimony constituted impermissible "vouching" and should have been excluded as a matter of law.

In support of the foregoing contention, appellant erroneously relies on *Bohnert v. State*, 312 Md. 266 (1988). In that case, the defendant, Bradley Bohnert, was charged with

second-degree sex offense for sexually abusing his live-in girlfriend's 14-year-old daughter. *Id.* at 269-70. At trial, the minor victim testified how Bohnert had sexually abused her. *Id.* at 270. Then, a social worker, accepted by the court as an expert in the field of child sexual abuse, testified that, after speaking with the victim, the victim's mother, and "other people," it was her expert opinion that the victim had in fact been the victim of sexual abuse. *Id.* at 270-72.

Following Bohnert's conviction of second-degree sex offense and this Court's affirmance of that conviction, the Court of Appeals reversed, holding that the trial court erred in permitting the social worker to testify that the victim had been sexually abused. *Id.* at 279. The Court began its analysis by propounding that, "[i]n a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Id.* at 277. Then, after noting that "the outcome of the case depended on the jury's determination of the credibility of two witnesses, the accuser and the accused" and that the opinion of the social worker "was of utmost significance in that determination," the Court declared that it was "error for the [trial] court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying." *Id.* at 273 (citing *Thompson v. Phosphate Works*, 178 Md. 305, 317-19 (1940); *American Stores v. Herman*, 166 Md. 312, 314-15 (1940)). The Court further explained:

> The opinion of [the social worker] that [the victim] in fact was sexually abused was tantamount to a declaration by her that the child was telling the truth and that Bohnert was lying. In the circumstances here, the opinion could only be reached if the child's testimony were believed and Bohnert's

> testimony disbelieved. The import of the opinion was clear – [the victim] was credible and Bohnert was not. Also, the opinion could only be reached by a resolution of contested facts – [the victim's] allegations and Bohnert's denials. Thus, the opinion was inadmissible as a matter of law because it … encroached on the jury's function to judge the credibility of the witnesses and weigh their testimony and on the jury's function to resolve contested facts.

Id. at 278-79.

In contrast to the social worker in *Bohnert*, who based her opinion almost exclusively on the victim's testimony when she opined that the victim was "telling the truth" when she stated that Bohnert had sexually assaulted her, Nurse Nana, in the instant case, did not offer an opinion as to whether T.S.'s testimony was truthful, nor did she give her opinion as to whether T.S. had in fact been sexually assaulted. Rather, Nurse Nana merely testified that the pictures she took of T.S.'s genitalia were consistent with digital penetration. Moreover, unlike the social worker's opinion in *Bohnert*, Nurse Nana's opinion was based on evidence independent of T.S.'s account of the assault. Thus, although Nurse Nana's expert opinion may have lent support to T.S.'s testimony regarding the assault, that opinion was not "an opinion on the credibility of another witness." *Hunter v. State*, 397 Md. 580, 589 (2007).

IV.

Appellant contends that the circuit court erred in admitting into evidence the results of DNA testing that were "inconclusive." That evidence was in the form of a report that was prepared by Christy Silbaugh, a forensic scientist with the Baltimore Police Department. In that report, which was admitted into evidence without objection, Ms.

Silbaugh indicated that she had analyzed genetic material that had been recovered from T.S. by Nurse Nana during the SAFE examination and that analysis of those samples were either "indeterminate" or "inconclusive" as to whether appellant had been a contributor to any of the DNA profiles she identified in the samples. Upon the admission of the report, the State asked Ms. Silbaugh:

[STATE]: Is there a meaning for indeterminate?

[WITNESS]: Yes.

[STATE]: And what is that meaning.

[DEFENSE]: I'm going to object.

THE COURT: Overruled.

[WITNESS]: Indeterminate, I'm going to read from the report, the footnote that goes with the indeterminate statement and would be footnote number two. "Due to the complexity of the genetic information available, or the possibility of incomplete detection of genetic information, no definitive conclusions can be made whether an individual may or may not be a contributor to the minor portion of the DNA profile."

[STATE]: Okay. Is there a meaning that you ascribe to the word inconclusive?

[WITNESS]: Yes.

[DEFENSE]: Objection.

THE COURT: Overruled.

* * *

[STATE]: So what does inconclusive mean?

[WITNESS]: The footnote, which is footnote number one, stating the meaning of inconclusive. "Is the current methods of analysis did not generate enough data to make a conclusion regarding the inclusion or exclusion of any individual."

[STATE]: Now does inconclusive have a technical meaning or is that just the everyday definition – the everyday Dictionary definition of inconclusive?

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: In DNA analysis, our use of inconclusive simply means there was very little DNA and it's enough to make a comparison.

[STATE]: So is that the result of your – that is the final result of your analysis, that it's inconclusive?

[WITNESS]: Correct.

[STATE]: All right. So based on your analysis, can you tell us whether or not [appellant] had any physical contact with [T.S.]?

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: I have not identified [appellant] on any of the items that I completed DNA analysis on.

[STATE]: Okay. Can you exclude [appellant], based on your analysis, from having any physical contact with [T.S.]?

[DEFENSE]: Objection.

THE COURT: Duly noted. Overruled.

[WITNESS]: The only thing that I can state in reference to any of the samples that I have completed for DNA analysis in this case, is that [appellant] was not identified on any of the items.

[STATE]: Is it possible, based on your analysis, that [T.S.] and [appellant] did have physical contact that would still generate an inconclusive report?

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: I think the only thing that I can state is that [appellant] was not identified on any of the items that I analyzed for DNA analysis.

Appellant contends that the circuit court erred in permitting Ms. Silbaugh to testify that the results of the DNA testing were "inconclusive" and that those results did not exclude appellant as the "perpetrator of assaultive behavior towards [T.S.]" That testimony was, insists appellant, "evidence of nothing" and thus was irrelevant and prejudicial.

However, this contention was also not preserved for appeal. Although appellant did object when Ms. Silbaugh testified that the inconclusive DNA results could not exclude him as the perpetrator, he did not object when the circuit court admitted into evidence Ms. Silbaugh's DNA report, which contained virtually the same information and thereby waived his earlier objection. *See DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection."); *See also* Md. Rule 4-323(a).

But, even if the foregoing argument were preserved, we conclude that any error in admitting the testimony in question amounted to no more than harmless error. This

identical issue arose in *Diggs & Allen v. State*, 213 Md. App. 28 (2013), *aff'd* 440 Md. 643 (2014), where we held that, although inconclusive DNA results were "evidence of nothing, … any error committed in admitting this evidence is harmless beyond a reasonable doubt because evidence of nothing could not prejudicially affect the fairness of [the defendant's] trial." *Id.* at 66-67.

V.

Appellant's final contention is that the circuit court erred in allowing the prosecutor, during closing argument, to inform the jury that he introduced inconclusive DNA results because he did not want the jury to think that he was "trying to hide anything" and that said results could "neither include nor exclude appellant as having any sort of contact." This contention is based on the following exchange between court and counsel during the State's closing argument:

> [STATE]: Now we also had DNA evidence in this case, and I put on our DNA experts even though the DNA finding was inconclusive because I didn't want you to think that I was trying to hide anything from you.
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.
>
> [STATE]: And what does inconclusive mean? You heard [Ms. Silbaugh] tell you exactly what inconclusive means, both as a dictionary definition and as a technical definition. Inconclusive means simply that they can't come to a conclusion either way. An inconclusive result means that Ms. Silbaugh as a DNA analyst can neither include nor exclude [appellant] as having any sort of contact with [T.S.]. So the mere fact that the DNA

> report is inconclusive is not evidence of [appellant's] innocence. It's simply an inconclusive test.

Appellant claims that the prosecutor's comment that he "didn't want [the jury] to think that [he] was trying to hide anything" constituted impermissible "vouching" and that the prosecutor's later assertion that "an inconclusive result" meant that Ms. Silbaugh could "neither include nor exclude [appellant] as having any sort of contact with [T.S.]" improperly characterized Ms. Silbaugh's testimony and thereby "only served to mislead or confuse the jury."

"Closing arguments are an important aspect of trial, as they give counsel 'an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose deficiencies in his or her opponent's argument.'" *Donaldson v. State*, 416 Md. 467, 487 (2010) (citations omitted). And, in so doing, "'attorneys are afforded great leeway[.]'" *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)).

"Despite this lack of 'hard-and-fast limitations' on closing arguments, one technique in closing argument that consistently has garnered [] disapproval, as infringing on a defendant's right to a fair trial, is when a prosecutor 'vouches' for (or against) the credibility of a witness." *Spain v. State*, 386 Md. 145, 153 (2005). "Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity…or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Id.* (citations omitted). That is improper because it "can convey the impression that evidence not presented to the jury, but known

to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury[.]" *U.S. v. Young*, 470 U.S. 1, 18 (1985); *Accord Sivells v. State*, 196 Md. App. 254, 278 (2010). Moreover, prosecutorial vouching "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19.

"The determination whether counsel's 'remarks in closing were improper and prejudicial, or simply permissible rhetorical flourish, is within the sound discretion of the trial court to decide." *Sivells*, 196 Md. App. at 271 (citations omitted). We generally defer to the judgment of the trial court because it "is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Whack v. State*, 433 Md. 728, 742 (2013). "As such, we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured of a party." *Id.* (citations and quotations omitted). An abuse of discretion does occur, however, when a trial judge exercises his or her discretion "in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Brewer v. State*, 220 Md. App. 89, 111 (2014) (citations and quotations omitted).

To begin with, the State suggests that appellant's contention regarding the prosecutor's characterization of Ms. Silbaugh's testimony was not preserved for appellate review because appellant did not object when that characterization was made. We agree. *See Shelton v. State*, 207 Md. App. 363, 385 (2012) ("We have repeatedly held that

pursuant to [Maryland] Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal.").

In any event, reversal is not warranted. Although Ms. Silbaugh did not expressly state that appellant could neither be included nor excluded as having any sort of contact with T.S., that comment, by the prosecutor, was not untrue. The inconclusive DNA results did not establish whether appellant had any contact with T.S., and thus the prosecutor's comment was a fair and reasonable characterization of Ms. Silbaugh's testimony. And, even if the comment was improper, we cannot say that the jury was "actually misled or were likely to have been misled … to the prejudice of the accused[.]" *Id.* at 387. As the State put it, the prosecutor's comment was "not the kind of sustained, highly inflammatory remark" that has required reversal in other cases. *Cf. Lawson v. State*, 389 Md. 570, 579-81 (2005).

Finally, as the State notes, the prosecutor's comment regarding his reasons for introducing the DNA evidence did not constitute "vouching" because the comment was not "a personal assurance of a witness's credibility based on the prosecutor's personal belief or on the implied assurance of information not in evidence." Thus, the circuit court did not abuse its discretion in permitting the comment.

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