UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2401

September Term, 2014

EMMANUEL SANDY

v.

STATE OF MARYLAND

Wright,
Graeff,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: January 15, 2016

Emmanuel Sandy, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of sexual abuse of a minor and two counts of third-degree sexual offense.[1] Appellant asks three questions on appeal:

> I. Did the trial court violate appellant's constitutional rights when it permitted the State to introduce into evidence a paternity report because it contained testimonial statements of a non-testifying expert witness?
>
> II. Did the trial court err in not allowing the defense to call a witness as an expert witness who would have testified whether the manner of self-insemination described could feasibly result in pregnancy?
>
> III. Did the trial court err in admitting prior consistent statements of the victim?

We are persuaded that the paternity report was testimonial and admitted in error. Therefore, we shall reverse appellant's convictions. Because appellant's two remaining questions may arise on retrial, we shall address them for guidance.

FACTS

The State's theory of prosecution was that appellant engaged in sexual intercourse with his sister-in-law, S.W., about ten times when she was between 12 to 15 years old. The State introduced DNA evidence linking the product of conception to appellant and S.W. and testimonial evidence from, among others, S.W. and several police officers. The theory of defense was that appellant did not have sexual intercourse with S.W. The defense argued

[1] The jury acquitted appellant of two counts of second-degree rape. Appellant was sentenced to twenty years incarceration, all but ten years suspended, for sexual abuse of a minor and two concurrent, suspended, ten-year sentences on his remaining two convictions.

that the reason that the product of conception contained appellant's DNA was because S.W. artificially inseminated herself using a used condom of appellant's and a nasal aspirator. Appellant, Zainab Sandy (S.W.'s sister and appellant's wife), and a defense investigator testified for the defense. Viewing the evidence in the light most favorable to the State, the following was elicited at appellant's trial.

On February 22, 2013, appellant took S.W., his then 15-year-old sister-in-law, to Forest Glen Medical Center for an abortion. The front desk assistant described appellant's behavior on his arrival: appellant "kept speaking for [S.W.]," "[h]e kept trying to fill out the paperwork for her" even after he was informed that the patient was to fill out the paperwork herself, and "[w]henever I talked to her, he would answer, even though I was looking at her directly." When the assistant asked appellant for his and S.W.'s identification, appellant became upset. When the assistant explained that certain papers needed to be filled out by S.W.'s parent or guardian because she was under 18 years of age, appellant became even more upset and responded that he did not need to fill out any paperwork because he was her uncle and that he had made the appointment.

The abortion process included five different steps: intake and counseling, ultrasound, lab work, actual abortion procedure, and recovery. As S.W. went through the stages, appellant was seen pacing back and forth in the waiting room and peeking into the room where S.W. was and asking what was taking so long. Finally, appellant tried to go past the assistant and enter the procedure room. According to the assistant, appellant was yelling in

a foreign language and S.W. began crying and backing away from him and cowering in the corner. The assistant called the police, and appellant left. Soon thereafter, the police arrived and appellant returned with S.W.'s mother. According to the assistant, appellant seemed "annoyed" that the police were there, and he wanted to leave immediately. When asked, appellant told the responding officer that he brought S.W. to the clinic because she told him she was pregnant. He said he did not know who had impregnated her.

From the clinic, appellant, S.W., and her mother were taken to the office of Detective Timothy Beardsley with the Montgomery County Police Special Victims Investigations Division. S.W. told the detective that appellant was the father of the product of conception and that appellant had engaged in sexual intercourse with her about 10 times over the past three years. Detective Beardsley also spoke with appellant, who waived his *Miranda* rights.[2] Appellant initially told the detective that possibly one of the boys S.W. knew at school had impregnated her. An hour later he told the detective that S.W. had impregnated herself by taking a condom that he had used after having sexual intercourse with his fiancé, S.W.'s sister, and then putting the condom inside her vagina. When S.W. told appellant she was pregnant, he bought her a home pregnancy kit that came back positive. He said that he made the appointment at the clinic to verify with an obstetrician that she was pregnant. He claimed to not know that the clinic did abortions.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The product of conception was taken from the clinic to the Montgomery County Police Crime Laboratory. A forensic analyst testified that she took several DNA samples from the product of conception, and then extracted, amplified, and determined the DNA profile of it. She then sent the DNA profile to Cellmark Forensics to perform the calculations regarding the likelihood of paternity.

Dr. Wayne Hoffman, a Cellmark supervisor who was admitted as an expert in the field of DNA testing, testified that Cellmark used the information provided by the Montgomery County Police Crime Laboratory to do a paternity calculation, and that Cellmark issued a report regarding the probability that appellant was the biological contributor to the product of conception. The report, which was admitted into evidence, states: "The alleged father, Emmanuel Sandy, cannot be excluded as the biological father of the product of conception. Based on these results, the probability of paternity is 99.99% as compared to an untested, unrelated male of the North American Black Population[]. The combined paternity index of all fifteen genetic systems is 24,234,009 to 1." Dr. Hoffman testified that this was "very strong genetic evidence.

S.W. testified that she lived with her mother, siblings and step-father in Silver Spring, Maryland. S.W. explained that in 2011, while she was in fifth grade, she spent weekends with her sister's family in their one-bedroom basement apartment in Kensington. Appellant is S.W.'s sister's husband, and S.W.'s sister and appellant have two young children. S.W. described her relationship with her sister during this time as "best friends." S.W. likewise

had a close relationship with appellant who helped her with her homework and took her places to buy things and to eat. A year or so later, S.W.'s sister and appellant moved to a two-bedroom house in Gaithersburg.

S.W. initially testified that "nothing happened" between her and appellant. She later testified that after the abortion procedure she told the police that appellant had raped her about ten times. She told the police that the rape occurred at both residences and sometimes he used a condom and sometimes he did not and would ejaculate on her back. She testified that she told the Assistant State's Attorney a week before trial that she did not want appellant to go to jail because her nieces needed a father in their life. She testified that she had lied earlier in her trial testimony when she had said "nothing happened" because she felt responsible, testifying, "[s]ometimes I would force him[.]"

S.W. also initially testified that her pregnancy was not because of sexual intercourse with appellant but because she had inseminated herself with his used condom. She admitted, however, that when she spoke to the Assistant State's Attorney before trial she had said she got pregnant because appellant had sex with her in a car and he had ejaculated inside her. She then testified that the insemination story was a lie that she told because she did not want appellant "to get in trouble and, and I just want to make everything better." She testified that she had not seen or spoken to her sister or nieces since the police became involved immediately following the abortion. She testified that she had lied earlier in her trial

testimony about not having sex with appellant and the insemination story because "I don't want my family to hate me."

On cross-examination, S.W. admitted that her story changes depending on what she thinks the person asking the questions wants her to say. She testified that she had spoken to a defense investigator about eight months after the abortion and to defense counsel prior to trial and in those conversations she told them that she had impregnated herself with a nasal aspirator and a used condom of appellant's that she found in the trash can because she was angry at appellant and her sister because they would not let her attend the school she wanted to attend and because they wanted her to focus on schoolwork and chores, which resulted in her inability to participate in after-school activities.

DISCUSSION

I.

Appellant argues that the trial court erred when it admitted into evidence a written report by Cellmark Forensics that included an opinion regarding the probability that appellant was the contributor to the product of conception. Citing *State v. Norton*, 443 Md. 517 (2015), appellant argues that the report was testimonial and, because the report's author was not available to testify at trial, the report should not have been admitted into evidence. The State agrees that under the new two-pronged test of *Norton*, the report was inadmissible. Nonetheless, the State argues that the report was harmless for two reasons. First, the report was cumulative because Dr. Hoffman opined, without objection, as to the statistical

probability that appellant was a contributor to the product of conception. Second, the report was harmless because appellant's defense was not that appellant did not contribute to the product of conception, but rather that S.W. impregnated herself with appellant's sperm.

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" *See also Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). "[A] violation of the Confrontation Clause requires that the offered statement or evidence be both testimonial and introduced for its truth[.]" *Cooper v. State*, 434 Md. 209, 236 (2013), *cert. denied*, 134 S.Ct. 2723 (2014).

Over the last decade or so, the courts have grappled with refining what is meant by "testimonial." Prior to the Court of Appeals recent decision in *State v. Norton*, 443 Md. 517 (2015), Maryland subscribed to the "formality" test enunciated by Justice Thomas's concurrence in the plurality opinion of *Williams v. Illinois*, 132 S.Ct. 2221 (2012). *Cooper*, 434 Md. at 235. Under that test, a statement is testimonial only if it bears the "solemnity of an affidavit or deposition" by being a "sworn []or a certified declaration of fact." *Id*. (quotation marks omitted). After *Norton*, the Court of Appeals adopted a two-part test: A statement is non-testimonial and admissible in the author's absence if the statement satisfies *both* Justice Thomas's formality test and Justice Alito's "primary purpose" test. *Norton*, 443 Md. at 548-50. A statement is testimonial under the "primary purpose" test if it was made

with the "primary purpose of accusing a targeted individual of engaging in criminal conduct." *Id*. at 548 (quotation marks and citation omitted).

The State essentially concedes that the Cellmark Report is testimonial under the two-prong test of *Norton*, and therefore inadmissible. The State admits that even if the Report did not qualify as testimonial under Justice Thomas's formality test because nowhere on the report is "there an indication that the results are sworn to or certified or that any person attests to the accuracy of the results[,]" *Cooper*, 434 Md. at 236, the Report was most likely testimonial under Justice Alito's primary purpose test because the report contains a conclusion that connects the defendant to the underlying crime. *Accord Norton*, 443 Md. at 548-49 (concluding that a paternity report in that case was testimonial under both tests because the report was certified and signed by the analyst and created with the primary purpose of accusing appellant of criminal conduct). The Report concludes that appellant is the genetic contributor to the product of conception and so connects him to the crime of sexual abuse of a minor. The State argues, however, that the error in admitting the report was harmless. We disagree.

The Court of Appeals announced the standard for evaluating harmless error in *Dorsey v. State*, 276 Md. 638, 659 (1976)(footnote omitted):

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable

> possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

See Dove v. State, 415 Md. 727, 743 (2010)(quoting *Dorsey*, *supra*). Essentially it is our task to determine "whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded." *Ross v. State*, 276 Md. 664, 674 (1976).

The Cellmark lab report provided a "combined paternity index" of 24,234,009 to 1, which expressed the likelihood that appellant and S.W. produced the product of conception. The report provided concluded that the probability that appellant was the contributor to the product of conception was "99.99 %" compared to an untested, unrelated black male in North America. Dr. Hoffman testified for the State as an expert and gave his opinion based on the statistical paternity calculations performed by Cellmark. Dr. Hoffman testified that the higher the ratio, the stronger the genetic evidence. Dr. Hoffman opined that the result here was "very strong genetic evidence" and reiterated the statistical analysis and conclusion in the Cellmark report.

The State argues that admission of the report was harmless because it was cumulative of Dr. Hoffmann's own opinion regarding the meaning of the combined paternity index. Additionally, the State argues that the error was harmless because appellant did not contest paternity. Appellant's defense, both in his statement to the police and at trial, was that he

did not have sexual contact with S.W. and that she had impregnated herself by using his sperm from a discarded condom. The State argues that defense counsel never disputed that appellant was the biological contributor to the product of conception, pointing out that the only questions defense counsel asked Dr. Hoffman on cross-examination were to confirm that the paternity index "doesn't tell us anything about the means of conception" and that the paternity index does not tell us whether the product of conception "was conceived through sexual intercourse or artificial insemination[.]"

We are persuaded that the error was not harmless. The Court of Appeals has observed that "[l]ay jurors tend to give considerable weight to 'scientific' evidence[.]" *Clemons v. State*, 392 Md. 339, 372 (2006)(quoting *Reed v. State*, 283 Md. 374, 386 (1978)). Without the scientific evidence, this was a case largely dependent on the credibility of the victim. S.W. testified that she had no sexual contact with appellant, that she inseminated herself, and that she did have sex with appellant. Given her vacillations, the weight of the scientific evidence in this case, even in light of the fact that the defense largely did not contest paternity, was such that we are unable to declare, beyond a reasonable doubt, that the error in no way influenced the verdict. Accordingly, we shall reverse the convictions.

We will address appellant's two remaining questions because it is likely they may arise again on retrial.

II.

Appellant argues that the trial court abused its discretion when it refused to allow him to call Dr. Suzanne Rotolo as an expert. She would have opined that it was feasible for S.W. to inseminate herself using a nasal aspirator inserted in her vagina that contained appellant's semen from a condom discarded in a trash can. The State argues that the court did not abuse its discretion. We agree with the State.

Md. Rule 5-702 titled **"Testimony by experts**." provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

We have set forth the circumstances under which an expert may express an opinion in his field of expertise:

> An expert opinion derives its probative force from the facts on which it is predicated, and these must be legally sufficient to sustain the opinion of the expert. *Doyle v. Rody*, 180 Md. 471, 25 A.2d 457 [(1942)]. The premises of fact must disclose that the expert is sufficiently familiar with the subject matter under investigation to elevate his opinion above the realm of conjecture and speculation, for no matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown. *State, Use of Stickley v. Critzer*, 230 Md. 286, 186 A.2d 586 [(1962)], and cases cited therein; *Hammaker v. Schleigh*, 157 Md. 652, 147 Atl. 790 [(1929)]. The opinion of an expert, therefore, must be based on facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support such conclusion. The facts upon which an expert bases

> his opinion must permit reasonably accurate conclusions as distinguished from mere conjecture or guess. *Marshall v. Sellers*, 188 Md. 508, 53 A.2d 5 [(1947)].

Evans v. State, 322 Md. 24, 34-35 (1991)(citation omitted). "[W]hether an expert witness has an adequate factual basis for his opinion is discretionary and will not be overturned absent a showing of abuse." *Diaz v. State*, 129 Md. App. 51, 76 (1999)(citation omitted). *See also Merzbacher v. State*, 346 Md. 391, 404 (1997)(noting the abuse of discretion standard for the admission of evidence and cases cited therein).

Outside the presence of the jury, Dr. Suzanne Rotolo explained her background and experience. She told the court that she was a registered nurse with a Masters and Ph.D. in nursing. She had been a Sexual Assault Nurse Examiner (SANE) for 22 years and had taken courses in anatomy and fertility, although she had no specialized knowledge in urology, obstetrics, or fertility. She said that by policy, SANE nurses were instructed that for the purposes of determining DNA, they could recover sperm from a woman's vagina or cervix up to five days after intercourse. She did not know, however, how long sperm could remain motile outside the body. She was unfamiliar with the materials used in various insemination kits sold over the counter and what materials favored or disfavored insemination. She also did not know the effect of latex on sperm motility.

As the trial court correctly noted, the two relevant questions in this case were whether ejaculated sperm could have survived in the condom long enough for S.W. to successfully inseminate herself, and whether a nasal aspirator was a feasible method of insemination.

When asked if she could offer an opinion on either one of these, Dr. Rotolo answered. "[n]o." We are persuaded, under the circumstances presented, that Dr. Rotolo was not qualified to offer an expert opinion that was helpful to the jury, and therefore, the trial court did not abuse its discretion in refusing to allow her to testify.

III.

Lastly, appellant argues that the trial court erred in allowing Detective Beardsley to testify that when he interviewed S.W. immediately after the abortion, S.W. told him that appellant had impregnated her and that he had sexual intercourse with her approximately 10 times. Appellant argues that the testimony was inadmissible under Md. Rule 5-616(c) because it did not detract from defense counsel's impeachment of S.W. The State responds that S.W.'s statement to Detective Beardsley did detract from appellant's impeachment of S.W. We agree with the State.

Md. Rule 5-616(c)(2) provides: "A witness whose credibility has been attacked may be rehabilitated by . . . evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]" Under that Rule, "a witness's prior consistent statements are admissible, not as substantive evidence, but for nonhearsay purposes to rehabilitate the witness's credibility." *Thomas v. State*, 429 Md. 85, 97 (2012)(citing *Holmes v. State*, 350 Md. 412, 416-17 (1998)). As we have recently put it: "A review of Rule 5-616(c)(2) indicates that there are three prerequisites to admission of a prior statement as rehabilitation: (1) the

witness' credibility must have been attacked; (2) the prior statement is consistent with the trial testimony; and (3) the prior statement detracts from the impeachment." *Hajireen v. State*, 203 Md. App. 537, 555 (2012). We have stated that the prior consistent statement must show "some rebutting force beyond the mere fact that the witness had repeated on a prior occasion the statement consistent with his trial testimony." *Id*. at 557 (quotation marks and citations omitted). A ruling on the admissibility of evidence ordinarily is within the trial court's broad discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011).

We are persuaded that the trial court did not abuse its discretion in allowing Detective Beardsley to testify to S.W.'s prior statement for it detracted from appellant's impeachment of S.W. While at the clinic to have an abortion, she had no idea that she would end the day with Detective Beardsley's questioning her about the circumstances of her pregnancy. Her statement to him responds directly to her trial testimony and rehabilitates her credibility that she told a defense investigator that she had inseminated herself.

The facts of this case are distinguishable from *Thomas* and *Hajireen*. In both cases the prior statement did not respond to the impeachment and was simply a recitation of the witness's trial testimony. *Hajireen*, 203 Md. App. at 558 ("The only 'rebuttal value' the prior consistent statements had was the mere fact that [the victim] had repeated on an earlier occasion many of the statements she made at trial.") and *Thomas*, 429 Md. at 108 ("Repetition of [the witness's] in-court testimony by police officers does not make [his] testimony any more believable, nor does it undermine the argument presented by the

defense[.]"). Here, S.W.'s statement was a direct response to her impeachment and so possessed "some rebutting force beyond the mere fact that the witness had repeated on a prior occasion the statement consistent with his trial testimony." *Hajireen*, 203 Md. App. at 557 (quotation marks and citations omitted). Accordingly, the trial court did not abuse its discretion in admitting Detective Beardsley's testimony.

JUDGMENTS REVERSED.

COSTS TO BE PAID BY MONTGOMERY COUNTY.