Circuit Court for Frederick County
Case No. 10-K-15-056300

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2662

September Term, 2016

REGINALD MENTOR

v.

STATE OF MARYLAND

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Berger, J.

Filed: November 8, 2017

Appellant, Reginald Mentor, was convicted by a jury in the Circuit Court for Frederick County of sexual abuse of a minor, second-degree assault, second-degree child abuse, and second-degree sex offense. The court sentenced appellant to life in prison, with all but 50 years suspended for the second-degree sex offense, and to concurrent sentences of 25 years' imprisonment for sexual abuse of a minor, and 15 years' imprisonment for second-degree child abuse. The court merged, for sentencing purposes, the conviction for second-degree assault into the conviction for second-degree child abuse. Appellant presents the following question for our review, which we have rephrased slightly: Did the trial court err in admitting hearsay evidence?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

I. FACTUAL BACKGROUND

In February 2015, appellant and Ms. C., his romantic partner of eighteen months, lived together in her Frederick home with her eight-year-old daughter, A.C., her two-year-old son, E.D., and appellant's two teenage sons, M.A. and M.K. On the evening of February 13, 2015, appellant went out with friends and Ms. C. remained home with the children. A.C. fell asleep on the couch while watching television with Ms. C. and E.D. Between 10:00 p.m. and 11:00 p.m., Ms. C. put A.C. to bed in A.C.'s bedroom. A.C. was dressed in a pajama top and underwear. At approximately midnight, Ms. C. went to her bed, and brought E.D. with her because he had been sick. M.A. and M.K. stayed up watching television.

Several hours later, Ms. C. was awakened by M.K., who told her that appellant was home. Ms. C. walked into the hallway and found appellant and A.C. lying on the floor of

A.C.'s bedroom as if "they were sleeping." A.C.'s head was on appellant's arm and she wasn't wearing any underwear. Ms. C. tried unsuccessfully to awaken appellant. When Ms. C. tried to remove A.C. from appellant's arm, appellant gripped his arm tightly around A.C.'s neck, and Ms. C. could not free her. With M.K.'s help, Ms. C. and M.K. were able to free A.C. from appellant's grasp, and move her to Ms. C.'s bedroom door, while appellant lay there "mumbling."

Ms. C. realized immediately that A.C. was unconscious and not breathing. M.K. called 911 while Ms. C. continued to try to wake A.C., shaking her, until A.C. finally took a "big, deep breath" and started breathing again. As A.C. struggled to regain consciousness, she acted like "she was dreaming," and began fighting and trying to get away from her mother. Ms. C. reassured her by repeating "it's mommy, it's mommy, it's mommy." Once A.C. recognized her mother, she began crying and shaking, and said, "he was kissing me on my mouth and my private parts." The recording of the 911 emergency call was played for the jury and admitted into evidence over defense counsel's objection.

Aaron Matthews, an emergency medical technician, responded to the initial emergency call at 4:00 a.m. at Ms. C's residence. E.M.T. Matthews encountered Ms. C. and A.C. in their living room, and observed that A.C. was "shaking a little bit" appearing as if "she was cold." He brought A.C. to the ambulance, and observed that she had a cut to her mouth on her lower lip. Matthews asked A.C. what happened to her lip, and she responded that "he was biting my lips to keep me from screaming," and that "he came into my room and started to kiss my underwear and kiss my butt and my private parts."

According to Matthews, A.C. also stated that he had his hands on her neck so hard that she couldn't breathe.

Paramedic Kenneth Smith also responded to the emergency call and joined Matthews at Ms. C.'s residence. Upon arrival, he observed that A.C. was shaking with a blank expression on her face, and that she appeared to be in a state of shock. Once inside the ambulance, Paramedic Smith observed that A.C. had redness and broken blood vessels in her eye, blood in the corner of her mouth, and red marks around her neck. He testified that she stated, "he came into my room and he woke me up. He started kissing my lips and then started kissing my butt and then he bit my lip so I wouldn't scream," and that he had his hands around her neck, and she started crying in the ambulance. A.C. was transported by ambulance to Frederick Memorial Hospital.

Officer Cory Borns of the Frederick Police Department testified that he was dispatched to Ms. C.'s home at approximately 4:00 a.m. on February 14, 2015, and that he arrived within five to ten minutes. Upon arrival, he was directed to an ambulance, where he encountered A.C., who was "visibly upset," sobbing and shaking, with a small amount of blood on her mouth. Initially, he could not understand A.C.'s responses to his questions because "she was so emotional and crying." A.C. explained that "her mother's boyfriend came into … her bedroom where she was sleeping on her bed, and kissed her in the area of her panties and on her mouth and then proceeded to put his hands around her neck or made it difficult for her to breathe."

Inside the home, Officer Borns observed appellant to be "intoxicated and disoriented," and "very slow and deliberate" as he descended the stairs with another officer,

stopping and sitting halfway down the stairs, "even though he was asked to come all the way downstairs into the living room." Once downstairs, appellant asked his sons why they had called the police. Thereafter, the officers explained to appellant that he would be detained and he stated that he understood. During transport to the police station, appellant stated that he "messed up." On his return home from the police station, appellant stated that "his mom warned him about living with a lady with a female child." Detective Gilbert Lege of the Frederick City Police Department interviewed appellant at the police station, and he noticed that appellant had "some fresh pockmarks or scratches on the left cheek." The detective photographed the marks on appellant's cheek, and the State introduced those photographs into evidence.

At the hospital, at approximately 6:00 a.m., forensic nurse Eileen Meyer performed a sexual assault forensic examination on A.C. Nurse Meyer explained that A.C. responded to her questioning as to what happened as follows:

> [S]he was lying in bed and a person was kissing her vagina, in her genital area and her butt. And that she was trying to push him away and by doing that, she ended up rolling on the floor. And then he put his hand over her neck and was holding her down. And she said that she was being choked, and that it hurt very bad and that she was having a hard time thinking.
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> * * *
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> [She was i]n a chokehold. And he was … kissing her and that he bit her on the lip.

Nurse Meyer observed that A.C.'s left cheek was "very swollen." Her left lip had "a lot of dried blood," it "looked cut and cracked," and she "was having a very difficult time opening up her mouth." A.C. also had redness in her eye, and her neck appeared "very

swollen and red," and there was "possible bruising and possible marks on her neck." The nurse took multiple swabs from A.C.'s mouth, lips, neck, fingernails and genital area. During the examination, A.C. "seemed to be having a hard time swallowing," and her voice "seemed coarse." Nurse Meyer photographed A.C.'s injuries and the State introduced those photographs into evidence.

DNA analysis of swabs taken from the area between A.C.'s legs and genitalia resulted in a mixed DNA profile consistent with the DNA of A.C. and appellant. Appellant's DNA could not be excluded from swabs taken from A.C.'s right fingernail, left lip, left cheek, neck and the outside of her underwear.

We shall provide additional facts as necessitated by our discussion of the issues presented.

II. DISCUSSION

Appellant challenges the admission of A.C.'s out-of-court statements and the 911 call, which he contends constituted hearsay, not subject to an exception. Appellant further contends that the admission of A.C.'s statements to Officer Borns and Nurse Meyer violated his right to confrontation because A.C. did not testify. Appellant claims that the admission of A.C.'s statements was not harmless beyond a reasonable doubt and constituted reversible error.

Hearsay is defined by Maryland Rule 5-801(c) as "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." Hearsay is generally inadmissible, and "*must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule" or is permitted by

applicable constitutional provisions or statutes. *Bernadyn v. State*, 390 Md. 1, 8 (2005). "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Id.; accord Thomas v. State,* 429 Md. 85, 98 (2012); *see also Gordon v. State,* 431 Md. 527, 538 (2013) ("[T]he trial court's legal conclusions are reviewed *de novo,* but the trial court's factual findings will not be disturbed absent clear error.") (internal citations omitted).

A. A.C.'s Statement to her Mother, Ms. C.

Appellant contends that A.C.'s statement to her mother that "he was kissing me on my mouth and my private parts," was hearsay, and that it did not qualify under the excited utterance exception to the hearsay rule because A.C. was no longer in danger or under the stress of the startling event when she made the statement. Over defense counsel's objection, the trial court found that A.C.'s statement to her mother was admissible under the excited utterance exception.

Rule 5-803(b)(2) defines an excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," and provides that an excited utterance is admissible as an exception to the hearsay rule. The Court of Appeals has explained that "[t]he rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *State v. Harrell*, 348 Md. 69, 77 (1997) (citation omitted). Further, "[t]he essence of the excited utterance exception is the inability of the declarant to have reflected on the events about which the statement is concerned. It requires a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence." *Parker v. State*, 365 Md. 299, 313 (2001)

(citation and quotation marks omitted).

The victim of a sexual offense is "clearly involved in a 'startling event' that can trigger an excited utterance." *Cooper v. State*, 434 Md. 209, 243 (2013) (holding that victim's statement to police officer describing sexual assault was admissible as an excited utterance where statement was made one hour after attack and victim was still emotional). Ultimately, it is the "emotional state of the victim at the time of her response [that] governs admissibility." *Davis v. State*, 125 Md. App. 713, 716 (1999) (concluding that rape victim's "emotionally agitated" statement to police was admissible as excited utterance as "[o]ne would be hard pressed to envision a more startling event than being dragged into an alley, thrown to the ground, and assaulted by an unknown assailant").

Here, there is no dispute that A.C.'s statement to her mother related to "a startling event" of being awakened in the middle of the night and assaulted in her bed by her mother's boyfriend. Moreover, the evidence showed that the statement was made while A.C. was under the stress or excitement caused by the startling event. Ms. C. testified that she discovered A.C. laying on her bedroom floor, unresponsive. After regaining consciousness, A.C. remained in a state "like she was dreaming" until she was fully awakened by her mother's repeated reassurances to her. A.C. was still under the stress of the startling event when she stated to her mother, while crying and shaking, that "he was kissing me on my mouth and my private parts." Because there was ample evidence to support the conclusion that A.C. was still under the influence of the startling event when she made the statement to her mother, the circuit court did not abuse its discretion in admitting the statement.

B. A.C.'s and Ms. C.'s Statements in the 911 Call.

Appellant argues that the statements of Ms. C. and A.C. during the 911 call failed to qualify as excited utterances because the State failed to establish, as a foundation for the exception, that Ms. C. or A.C. were under stress at the time of the 911 call. The State responds that appellant did not preserve this challenge because at trial defense counsel argued that the 911 call was inadmissible because it failed to qualify as a hearsay exception as "a proper electronic recording." Even if preserved, the State argues that the statements were admissible as excited utterances.

At trial, defense counsel objected to the 911 recording, arguing that "[i]t is not possible to understand clearly what the alleged victim witness is saying, therefore, I don't think it constitutes a proper electronic recording and don'[t] think it can come in under that hearsay exception for that reason." The prosecutor responded by stating, "I think it's both an excited utterance and a business record, and I think that … if the jury cannot hear clearly what is said, that's a factual issue[.]" The court overruled appellant's objection and admitted the 911 recording, which was played for the jury.

Under Rule 4-323(a), "[a]n 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." This contemporaneous objection rule is designed to ensure that the trial court has "an opportunity to consider the issue, and rule on it first, in the context of the trial." *DeLeon v. State,* 407 Md. 16, 26 (2008). "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[.]" Rule 8-131(a).

We agree with the State that defense counsel did not argue at trial that the statements failed to qualify as excited utterances due to a lack of foundation establishing that Ms. C. and A.C. were under stress at the time of the statements. Because the excited utterance exception was argued in opposition to appellant's objection, however, and the court overruled appellant's objection, we conclude that the issue was considered and decided by the trial court, and we shall review it.

Ms. C. testified that she told M.K. to call 911 when she realized that A.C. was not breathing. M.K.'s call to 911 did not connect, but the 911 operator called back and Ms. C. answered the call. Ms. C. informed the 911 operator that A.C.'s eyes were open but she would only respond if Ms. C. called her name repeatedly. While waiting for the ambulance to arrive, Ms. C. can be heard calling out to A.C. and asking her if she is ok. Ms. C. then asked the 911 operator to send police also. When asked by the 911 operator why she needed the police, Ms. C. responded that appellant "is really drunk," and that "[h]e doesn't even know what the hell is going on," and that his arms were around A.C.'s neck. In the background of the call, A.C. can be heard faintly saying that "he bit my lip and kissed my butt."

"The proponent of a statement purporting to fall within the excited utterance exception must establish the foundation for admissibility, namely personal knowledge and spontaneity." *Parker*, 365 Md. at 313. When determining the propriety of a trial court's decision to admit or reject excited utterance testimony, we apply a "case by case" analysis. *Johnson v. State*, 63 Md. App. 485, 493 (1985).

Ms. C.'s and A.C.'s statements during the 911 call were made within a short time of the startling events of A.C.'s assault and Ms. C. finding her daughter unconscious and half-dressed on the floor in appellant's chokehold. Appellant was still in the home on the floor of A.C.'s bedroom, only a short distance away from Ms. C., while she was on the 911 call. Ms. C.'s statements describing appellant's current condition and her observation of appellants' arms around A.C.'s neck were spontaneous and based on personal knowledge, as were A.C.'s statements, made in the moments after she regained consciousness from being choked and molested. We conclude that Ms. C. and A.C. were under the stress of startling events at the time of the 911 call, and that the trial court did not err in finding that their statements made during that call were admissible as excited utterances.

C. A.C.'s Statements to Officer Borns.

Appellant next challenges the admission of A.C.'s statement to Officer Borns on the grounds that the statement did not qualify as an excited utterance because it was the result of thoughtful consideration in response to police questioning, and because it violated his confrontation rights.

Officer Borns responded to the 911 call and arrived within five to ten minutes of the call. He located A.C. in the ambulance, bleeding from the mouth and observed that she was "visibly upset" and "crying, more of a sobbing." When Officer Borns asked A.C. "her name and what had happened," he could not understand her responses "because she was so emotional and crying." A.C. told him that her mother's boyfriend came into the bedroom where she was sleeping, and kissed her panties and her mouth, and "then proceeded to put his hands around her neck or made it difficult for her to breathe."

The fact that A.C. was responding to Officer Borns' questioning as to what happened, although relevant, is not dispositive as to whether the statement constitutes an excited utterance. *See Billups v. State,* 135 Md. App. 345, 360 (2000) (the fact that victim's statement was given in response to a question from police was relevant but "hardly dispositive"); *Marquardt v. State*, 164 Md. App. 95, 124 (2005) ("The lapse in time and spontaneity of the statement are factors to be considered in the analysis, but neither is dispositive.") (citation omitted). Shortly after she regained consciousness following the assault, A.C. remained visibly distraught by the traumatic events that she had just experienced. Her statement to Officer Borns was made while she was still under the stress of those events. *See Cooper*, *supra*, 434 Md. at 242-44 (statement to police officer describing sexual assault one hour after the assault when the victim was still emotional was admissible as excited utterance); *Billups, supra*, 135 Md. App. at 360-61 (holding that victim's statement to police officers was an excited utterance where victim appeared "scared and nervous" and made the statement within ten minutes of being shot and robbed). We conclude that A.C.'s statement to Officer Borns were spontaneous statements that were admissible as excited utterances.

Appellant contends that even if A.C.'s statement to Officer Borns was admissible as an excited utterance, it should have been excluded because it violated his right to confront his accuser. Whether a statement violates a defendant's confrontation rights is a question of law, which we review *de novo*. *Langley v. State*, 421 Md. 560, 567 (2011).

The Sixth Amendment to the United States Constitution provides that a defendant in a criminal trial has the right "to be confronted with the witnesses against him." U.S.

CONST. Amend. VI. The Sixth Amendment "guarantees a defendant's right to confront those 'who "bear testimony"' against him." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (citations omitted). In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Supreme Court held that the Sixth Amendment prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

In *Crawford*, the defendant was tried for assault and attempted murder after stabbing a man who allegedly attempted to rape his wife. *Id*. at 38. At trial, the State played a recorded statement that the defendant's wife had made to police in which she described the stabbing, but she did not testify. *Id.* In holding that the statement was testimonial and should not have been admitted, the Court explained that prior statements resulting from police interrogation, while in police custody, fit squarely within the definition of 'testimonial.' *Id*. at 65, 67-68. Nevertheless, the Court declined to "spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. (footnote omitted).

In *Davis v. Washington*, 547 U.S. 813 (2006), a consolidation of two cases, *Washington*[1] and *Hammon*,[2] the Supreme Court further explained when a statement is testimonial. In *Davis*, the Court rejected a challenge to the admission of a 911 call, concluding that the call was not testimonial. *Id*. at 828. The Court held that the victim, who placed the 911 call, was "speaking about events *as they were actually happening*, rather

[1] *Washington v. Davis,* 154 Wash.2d 291 (2005).

[2] *Hammon v. Indiana*, 829 N.E.2d 444 (2005).

than describ[ing] past events." *Id*. at 827 (citation and internal quotation marks omitted) (brackets and emphasis in original).

In *Hammon*, police officers responded to a "reported domestic disturbance," and arrived to find the victim on the front porch, who told police that "nothing was the matter." *Id.* at 819. Police spoke to the victim's husband inside the house, who indicated to police that although he and his wife had been fighting, "everything was fine now." *Id*. The victim then told police that her husband had shoved her and punched her in the chest twice. *Id*. at 820. The Court found that her statements to the police were testimonial because the police officer "was not seeking to determine 'what is happening,' but rather 'what happened.'" *Id*. at 830. The Court stated:

> [S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822 (footnote omitted). The Court also found it significant that the statements were "deliberately recounted" in response to police questioning and "took place some time after the events described were over." *Id*. at 830.

In *Head v. State*, 171 Md. App. 642 (2006), this Court considered whether statements made by a dying victim to a police officer were testimonial pursuant to *Davis*. *Id.* at 660. We concluded that the victim's statements in response to the police officer's question, "who shot you?" were not testimonial because the police needed to know, for

safety reasons, who shot the victim. *Id.* This Court explained that "[v]iewed objectively, the primary purpose of [the officer's] question does not appear to have been either to establish or prove past events for possible use at a trial." *Id.*

In *State v. Lucas*, 407 Md. 307 (2009), the Court of Appeals determined that statements made to police responding to a domestic call were testimonial. *Id*. at 309. In *Lucas*, when officers arrived at the scene, they discovered the defendant sitting outside the apartment on some steps and his girlfriend inside, in the lower level of the apartment building, standing in the doorway to the apartment. *Id*. at 309. She had a red face, swollen eyes, and red marks on her neck. *Id.* When questioned, she told the officer that she and her boyfriend were involved in an argument and that he had assaulted her. *Id.* at 309-10. The Court concluded that the interrogation objectively indicated a primary purpose to establish or prove past events potentially relevant to later criminal prosecution and not to enable the police to meet an ongoing emergency. *Id*. at 323-34 (citing *Davis, supra*, 547 U.S. at 822). The Court noted that a reasonable listener would recognize that the emergency had ended by the time the officer arrived. *Id*. at 324. In fact, the Court distinguished the case from other ongoing emergency cases in which the police had "encountered victims with apparent severe injuries requiring immediate medical attention and/or where an assailant had not yet been located." *Id.*

In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Supreme Court determined that a dying victim's statements to police, indicating who shot him and where the shooting had occurred, were nontestimonial. *Id.* at 377-78. The Court emphasized that "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather,

the ultimate inquiry is whether the primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency." *Id*. at 374 (citation marks and internal quotation marks omitted).

In *Brock v. State*, 203 Md. App. 245 (2012), a police officer responded to a report of a "cutting" at a bar. *Id.* at 263. Upon entering the bar, the officer observed a man lying on the floor bleeding profusely (the victim) and a second man "pacing" nearby and bleeding from his hands (the witness). *Id.* The officer asked the witness, "What's going on? … What's happening?," which suggested "that the officer was trying to learn the present basic facts about the nature of the crime or crimes and the parties involved." *Id.* at 264. This Court held that, viewed objectively, the total circumstances surrounding the witness's statement indicate that the witness's responses to the officer's questions were not testimonial, as the statements "strongly suggest a primary purpose of assisting the police to respond to the ongoing emergency by apprehending the perpetrator." *Id.* at 263-64. We noted that the "chaotic, fluid and uncertain context" in which the officer questioned the witness was more analogous to the emergency situations in *Bryant* and *Head*, *supra*, than the "controlled atmospheres" in *Crawford* and *Lucas, supra. Id*. at 264.

Returning to the present case, we conclude that A.C.'s statement to Officer Borns in response to his question, "what happened?" was not testimonial because it was made for the primary purpose of assisting Officer Borns in responding to an ongoing emergency. A.C. was bleeding from the mouth, sobbing, and incomprehensible when Officer Borns arrived within five to ten minutes of receiving the emergency call. Officer Borns did not know the extent of A.C.'s injuries or the location of the perpetrator. Officer Borns'

question was aimed at finding out what had caused A.C.'s injuries, and what type of response, if any, was necessary. As such, Officer Borns' question to A.C. was a preliminary assessment question rather than an attempt to gather evidence that could later be used at trial. Therefore, the admission of A.C.'s statement at trial did not violate appellant's confrontation rights.

D. A.C.'s Statement to E.M.T. Matthews and Paramedic Smith.

Next, appellant challenges the admission of A.C.'s statements to E.M.T. Matthews[3] and Paramedic Smith[4] on the grounds that those statements were not excited utterances nor were they germane to her medical treatment. Appellant argues that A.C. answered questions "in a manner that demonstrated reflection and consideration," at a time when she was safely removed from the initial event, once inside the ambulance. We disagree. Matthews observed A.C. to be shaking "as if she was cold," and Smith described A.C.'s condition as shaking and in a state of shock. Given the fact that A.C. had just been assaulted and choked unconscious, was bleeding from her mouth, and was being treated by paramedics in the ambulance at the time she made the statement, there was ample evidence demonstrating that A.C. remained under the stress of the traumatic events, and, as such, her statements to Matthews and Smith were admissible as excited utterances.

[3] E.M.T. Matthews testified that A.C. said that "he was biting my lips to keep me from screaming … he came into my room and started to kiss my underwear and kiss my butt and my private parts" and that he had his hands on her neck so hard that she couldn't breathe.

[4] Paramedic Smith testified that A.C. said, "he came into my room and he woke me up. He started kissing my lips and then started kissing my butt and then he bit my lip so I wouldn't scream" and that he had his hands around her neck.

Appellant also contends that A.C.'s statements to Matthews and Smith were inadmissible because they were not germane to medical treatment as there was no evidence that A.C. was aware that she was making the statements for the purpose of medical treatment. Specifically, appellant argues that A.C.'s statements failed to provide a "description of injuries sustained, or of present pain or injury, but a narrative account of alleged crimes."

Rule 5-803(b)(4) provides a hearsay exception for statements made for diagnosis and treatment, which are defined as:

> [S]tatements 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 for the medical treatment exception is that a "patient's statements [to his or her doctor are likely 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." *State v. Coates*, 405 Md. 131, 145 (2008) (citation and internal quotation marks omitted). The medical treatment exception extends to statements made in seeking medical treatment from other providers, such as paramedics. *Choi v. State,* 134 Md. App. 311, 321-22 (2000). In determining whether this hearsay exception is applicable, the trial court must decide whether the statements were both "taken and given in in contemplation of medical treatment or medical diagnosis for treatment purposes[.]" *Webster v. State*, 151 Md. App. 527, 537 (2003) (emphasis omitted).

Matthews and Smith were dispatched in response to a 911 call for an eight-year-old child with an altered mental status. Upon their arrival, A.C. appeared to be suffering from shock, and they observed visible injuries to A.C., including a cut to her mouth, redness and broken blood vessels in her eye, and red marks around her neck. Matthews and Smith asked A.C. basic questions about what had happened to her in order to provide appropriate medical assistance. A.C.'s responses to Matthews and Smith, while sitting on a stretcher in the ambulance, related to the cause of her injuries. In fact, A.C. did not identify appellant as the perpetrator in her statements to Matthews and Smith, but instead stated that "he" came into her room, kissed her private parts, bit her lip and held his hands on her neck so hard that she was unable to breathe. There was ample evidence to support the conclusion that A.C.'s statements to the Matthews and Smith inside the ambulance were made to obtain medical treatment. Accordingly, those statements were admissible pursuant to the medical treatment exception to the hearsay rule.

E. A.C.'s Statement During Sexual Assault Examination.

Appellant contends that A.C.'s statements to Eileen Meyer, the forensic nurse who examined A.C. at the hospital, were inadmissible because they were not made for the purpose of medical treatment and diagnosis, and they violated his confrontation rights because the statements were testimonial. The State responds that appellant failed to preserve this claim for appeal, but if not affirmatively waived, the trial court did not abuse its discretion or err in admitting the testimony.

Prior to Nurse Meyer's testimony, defense counsel challenged the admissibility of A.C.'s statements to Meyer on the grounds that Meyer's examination of A.C. was a forensic examination for the purpose of collecting evidence for use at trial, and any statements made during the examination were testimonial. Defense counsel acknowledged that certain statements made for the purpose of medical treatment would be admissible. The court deferred ruling on the admissibility of A.C.'s statements until Meyer testified.

When Meyer testified, defense counsel objected prior to Meyer's testimony regarding the details of A.C.'s exam, and a bench conference ensued. During that conference, the parties and the trial court agreed on which of A.C.'s statements would be admissible based on a list of statements prepared by the State. The trial court stated, "So for the record, the State intends to use certain statements now that [defense counsel] has conceded by the defense are germane, pathologically germane to medical issues… You can certainly object when other ones come up if it's anything different."

Following the bench conference, defense counsel did not object to Meyer's testimony regarding statements made by A.C. during the exam. Accordingly, appellant conceded that A.C.'s statements to Meyer were admissible as a hearsay exception for the purpose of medical diagnosis and treatment, and his challenge to those statements is waived. *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."); *Ridgeway v. State,* 140 Md. App. 49, 66, (2001) ("A challenge to the trial court's decision to admit testimony is not preserved unless an objection is made each time that a question eliciting that testimony is posed.").

But, even if appellant's claim that A.C.'s statements to Meyer did not qualify as statements made for diagnosis or treatment were preserved, appellant would fare no better. As set forth in Section D above, statements that are taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes, are admissible as a hearsay exception pursuant to Rule 5-803(b)(4).

In this case, Meyer introduced herself to A.C. at the hospital as a nurse who had special training to help A.C. with what happened to her. Meyer told A.C. that she would examine her, take samples of her urine and blood, and then Meyer would discuss the results with the doctor. Meyer then asked A.C. to explain to her what happened. A.C. responded that she was lying in bed when a person began kissing her vagina, her genital area and her butt. A.C. explained that she tried to push him away, but ended up rolling on the floor, and then he put his hand over her neck and held her down. A.C. further explained that she was choked, and that "it hurt very bad and that she was having a hard time thinking." She also stated that he was kissing her and that he bit her on the lip, and that she tried to get away by calling out and pinching his face. Meyer then examined A.C., collected samples of her blood and urine, and discussed the results with the doctor.

Appellant's contention that A.C.'s statements to Meyer did not qualify as medical statements due to Meyer's role as a forensic nurse is unsupported by the record. Meyers indicated that she has a dual purpose – to provide medical care to the victim and to collect evidence. This Court has previously determined that statements to SAFE nurses may serve a dual purpose -- medical and forensic -- but that fact does not disqualify such statements from being admissible under 5-803(b)(4). *See Webster*, 151 Md. App. at 546; *Coates*, 405

Md. at 143.

In *Coates*, a case relied upon by appellant, the examination of a seven-year-old sexual abuse victim was conducted one year after she alleged the incident took place. 405 Md. at 134-35. The Court found the following factors rendered the hearsay exception for medical diagnosis or treatment inapplicable to the child's statements:

> [the child's] question to [the SAFE nurse], following the interview, "are you going to go out and find him now?" suggests that [the child] believed she was being interviewed primarily for an investigatory, and not a medical, purpose. It is also noteworthy that at the time [the SAFE nurse] interviewed and examined [the child], she was not exhibiting any physical manifestation of abuse. *Although a patient's lack of symptoms is not dispositive, in combination with [the child's] young age, length of time since the last incident, and her question to [the SAFE nurse] about finding Coates*, the facts of this case suggest that [the child's] statements lack the indicia of sincerity that underlie the hearsay exception.

Id. at 145-46 (emphasis added). The Court of Appeals determined that the young child could not understand the medical, non-investigatory, purpose in obtaining the identity of her assailant. *Id*. at 147. In the present case, unlike *Coates*, there was no evidence to suggest that A.C. understood that her examination at the hospital was being conducted as part of a criminal investigation.

In *Webster*, we concluded that a four-year-old child victim of sexual assault understood the medical importance of the accuracy of her statements during her examination by a SAFE nurse following a sexual assault as evidenced by her responses describing what had happened to her. 151 Md. App. at 551. This Court, in affirming the admission of statements made to the SAFE nurse under the 5-803(b)(4) exception, noted

the importance that the victim was "questioned in emergent circumstances, within a few hours of the assault, in a hospital setting" by a "registered and presumably uniformed nurse". *Id*.

The medical examination in *Webster*, like that in the present case, was performed shortly after the incident, and A.C.'s statements to Meyer were provided primarily for the purpose of providing Meyer with the necessary information to provide her with the appropriate medical treatment. Accordingly, A.C.'s statements to Meyer would be admissible under 5-803(b)(4) as statements made for medical diagnosis or treatment.

Appellant further contends that A.C.'s statements to Meyer were testimonial and that their admission violated his right of confrontation. As set forth in Section E, appellant failed to preserve this objection to Meyer's testimony. Although defense counsel argued to the court *prior* to Meyer's testimony that her testimony violated appellant's right of confrontation, defense counsel did not raise that objection at any point during her testimony. Because Meyer testified regarding A.C.'s statements without objection, appellant's objection on the ground that the testimony violated his confrontation rights is waived. *See Wimbish v. State,* 201 Md. App. 239, 261 (2011) (holding that appellant's objection to testimony was waived when he failed to object to the testimony following the denial of his motion in limine and failed to request a continuing objection).

Acknowledging that his challenge to Meyer's testimony was likely waived, appellant submits that the waiver was due to ineffective assistance of counsel, and requests that this Court review his claim pursuant to Rule 8-131(a). We decline to do so. Typically, ineffective assistance claims are resolved in post-conviction proceedings. *See Robinson v.*

State, 404 Md. 208, 219 (2008) ("[A] claim of ineffective assistance of counsel should be raised in a post-conviction proceeding, subject to a few exceptions"); *accord Mosley v. State,* 378 Md. 548, 558–59 (2003). In *Mosley,* the Court of Appeals explained that "[p]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Id.* at 560 (citations and footnote omitted). In this case, defense counsel's reasons for agreeing to the admission of A.C.'s statements as medically germane are not apparent in the record. To the extent that appellant seeks to pursue an ineffective assistance of counsel claim on this issue, we conclude that the appropriate forum to do so would be in a post-conviction proceeding where the record can be sufficiently developed.

Even if the confrontation claim was preserved, we would conclude that the circuit court did not err in admitting the testimony. As forth in Section C *supra*, the Confrontation Clause of the Sixth Amendment prohibits the admission of testimonial statements against the accused by a non-testifying witness if there was no prior opportunity for cross-examination. *See Crawford, supra*.

Appellant contends that the reasoning of *State v. Snowden*, 385 Md. 64 (2005), controls the outcome of this case because here, as in *Snowden*, the forensic nurse performed an investigative interview to generate evidence for later use at trial. Appellant's reliance on *Snowden* is unavailing. In *Snowden*, the Court of Appeals held that child abuse victims' statements to a social worker were testimonial. *Id*. at 68. The Court stated:

> [A]n ordinary person in the position of any of the declarants would have anticipated the sense that her statements to the sexual abuse investigator potentially would have been used to prosecute [the defendant]. The interview questions posed by [the social worker], and the responses elicited, were in every way the functional equivalent of the formal police questioning discussed in *Crawford*, as a prime example of what may be considered testimonial.
>
> Most telling is the fact that [the social worker]'s participation in this matter was initiated, and conducted, as part of a formal law enforcement investigation. The children were interviewed at the behest of . . . the Montgomery County Police Department, [which] was actively involved in the investigation. Unlike some cases in which statements to investigators were deemed nontestimonial because they were in the course of ascertaining whether a crime had been committed, the children's statements were elicited by [the social worker] subsequent to initial questioning of them by the police and after the identity of a suspect was known.

Id. at 84 (citations and internal quotation marks omitted). In the present case, Meyer's examination of A.C. was not conducted as part of a formal law enforcement investigation, nor was a police officer present during the examination. Moreover, the interview questions posed by Meyer, and the responses elicited from A.C., were not "the functional equivalent of the formal police questioning." *See id.* Rather, the primary purpose of Meyer's informal questioning of A.C. was to obtain necessary information to diagnose and treat A.C.

The circumstances of A.C.'s statements to Meyer were more analogous to those in *Griner v. State*, 168 Md. App. 714 (2006). In *Griner*, this Court held that a four-year-old child's statements to a pediatric nurse were nontestimonial. *Id*. at 742. "When [the nurse] asked [the child] what happened to his eye, he replied that he had fallen. [The nurse] continued with her examination and, upon seeing the other bruises and scars, asked [the

child] if he was sure he had fallen. [The child] responded: '[W]ell actually my mom hit me with a stick.'" *Id*. at 726 (some alterations in original). This Court stated:

> [The nurse] examined and questioned [the child] as a routine preliminary procedure necessary prior to admitting him to the pediatrics ward. [The nurse]'s questioning of [the child] was not the equivalent of a police interrogation. [The nurse was] on the pediatrics ward performing her regular duties. The purpose of [the nurse]'s examination was to assess [the child]'s condition, obtain his vital signs, and administer any necessary medications. Upon meeting [the child], [the nurse] informed him that she was a nurse and that she was going to take care of him. The purpose of her questioning was to gather information so [the nurse] could pass that on to the doctors and collaborate on the plan of care and establish a good treatment plan.

Id. at 742-43 (internal quotation marks omitted).

Like the statements of the victim in *Griner,* A.C.'s statements were made shortly after her assault, and at a time when she was exhibiting injuries from the assault, including dried blood in her mouth, redness in her eye, and had a swollen and red neck with possible bruising. In this case, A.C.'s statements to Meyer in the hospital during A.C.'s examination, made shortly after the incident, were clearly aimed at obtaining medical treatment, not at prosecuting appellant.

In *Ohio v. Clark*, _ U.S._, 135 S. Ct. 2173, 2179 (2015), the Supreme Court determined that under the "primary purpose" test set forth in *Davis, supra,* statements of abuse made by a three-year-old child to preschool teachers was not testimonial. Although the Court declined to categorically exclude all statements to non-law enforcement personnel from the scope of the Confrontation Clause, the Court noted that under the "primary purpose" test, "[s]tatements made to someone who is not principally charged with

uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at 2181-82. The Court explained that "[i]n the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to creat[e] an out-of-court substitute for trial testimony." *Id.* at 2180 (citation and internal quotation marks omitted). Because we conclude that the "primary purpose" of A.C.'s statements to Meyer was to obtain medical treatment, not to provide an "out-of-court" substitute for trial testimony, the statements would not be testimonial and their admission would not violate appellant's right of confrontation.

Lastly, appellant argues that any error on the part of the trial court admitting A.C.'s hearsay statements was so important to the State's case that the cumulative effect of the errors was not merely "harmless"; therefore, his convictions must be reversed. The State argues that even assuming that one or more of A.C.'s out-of-court statements was improperly admitted, the error was harmless in light of the overwhelming evidence against appellant and the cumulative nature of A.C.'s statements. We agree.

Were we to determine that any of the testimony regarding A.C.'s statements should not have been admitted, we are persuaded that its admission in this case was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (stating that an error is harmless when a reviewing court is "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") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)); *accord Potts v. State*, 231 Md. App. 398, 408 (2016).

In addition to Ms. C.'s testimony regarding A.C.'s statements, she also described finding A.C. on the floor, without underwear, in appellant's "chokehold," and her struggle to help A.C. regain consciousness. There was ample testimony from E.M.T. Matthews, Paramedic Smith, and Nurse Meyer regarding their first-hand observations of the injuries to A.C.'s mouth and throat, and photographs of those injuries. Photographs of appellant taken at the police station showing some fresh "pockmarks or scratches" on appellant's cheek were also admitted, as were appellant's statements to police that he "messed up" and that "his mom warned him about living with a lady with a female child." There was also DNA evidence that swabs taken from various areas on A.C.'s body, including the area between her legs and genitalia, could not exclude appellant's DNA as a contributing source.

Moreover, the substance of each of A.C.'s statements was cumulative of similar statements that she made to other witnesses. The improper admission of any one statement, therefore, would not affect the outcome of the case. *See Snyder v. State*, 104 Md. App. 533, 564 (1995) (citing *Changing Point, Inc. v. Maryland Health Resources Planning Comm'n,* 87 Md. App. 150, 172 (1991) (holding that whether testimony admitted was hearsay was not important because the testimony was merely cumulative)); *McClurkin v. State,* 222 Md. App. 461, 484-85 (2015) (holding that erroneous admission of evidence was harmless where the evidence was cumulative of other more prejudicial evidence in an "overall" strong case against appellant). Under these circumstances, we conclude that any

alleged error in admitting the evidence complained of was harmless beyond a reasonable doubt.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.