Circuit Court for Montgomery County
Case No. 128585

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 02061

September Term, 2016

GUILLERMO A. PADILLA

v.

STATE OF MARYLAND

Wright
Leahy,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: September 26, 2018

Guillermo Padilla was convicted by a jury in the Circuit Court for Montgomery County of sexual abuse of a minor, his granddaughter S.B., and one count of third-degree sex offense, between January 1, 2013 and November 19, 2015. He brings this timely appeal and presents the following questions, which we have renumbered and rephrased[1]:

1. Whether the trial court violated appellant's constitutional right to confrontation by admitting S.B.'s statements?

2. Whether the trial court erred by admitting S.B.'s statements under the medical treatment or diagnosis hearsay exception?

3. Whether the trial court erred in declining to strike three jurors for cause?

For reasons stated below, we shall affirm the judgments of the trial court.

BACKGROUND

The Disclosure

On November 19, 2015, S.B. indicated to faculty at her school that she had been sexually abused by her paternal grandfather, appellant. Child Protective Services was notified and reported the disclosure to the Montgomery County Police Department. S.B., who was nine years old at the time, was interviewed[2] by Brittany Calandrio, a social worker with Child Protective Services and Detective Timothy Beardsley. The school contacted

[1] Appellant originally presented us with the following questions, quoted verbatim: 1. Was appellant's constitutional right to confrontation violated by the admission of S.B.'s out-of-court statements to the SAFE nurse, when he was not given the opportunity to cross-examine S.B.? 2. Did the trial court err in ruling that S.B.'s statements to the SAFE nurse were admissible under Md. Rule 5-803(b)(4)? and 3. Did the trial court err in refusing to strike three jurors for cause?

[2] This interview was recorded and the record contains a transcript of the interaction.

S.B.'s maternal grandfather (Pablo), whom she regularly resided with. He then took his granddaughter to Shady Grove Hospital.

At the hospital, S.B. was seen by a doctor, who conducted a brief "head-to-toe examination," then taken into a separate room by a forensic nurse examiner,[3] Katherine Swift. Swift introduced herself as "a special kind of nurse that's called in when someone may or may not have touched a person or a child in a way that made them uncomfortable." S.B. asked if she was going to receive a shot and Swift responded, "No". Swift then asked S.B. if anything had happened and S.B. began telling her about the touching.

Swift had S.B. change into a patient gown and conducted a physical examination of S.B., which began with a "head-to-toe" examination, checking S.B.'s entire body for any bruises, scrapes, lacerations, or other injuries. She then conducted a vaginal and perianal exam. Swift observed redness and a laceration in the lower vaginal area[4] and an "immediate dilatation" to the rectum. Following the examination, Swift discussed S.B.'s medical history with her grandfather, who immediately took her home.

Appellant was thereafter arrested and interrogated by detectives with the Montgomery County Police Department. He confessed to touching his granddaughter, but denied any penetration. A grand jury in the Circuit Court for Montgomery County indicted him on one count of sex abuse of a minor, two counts of rape in the second degree, and two counts of sex offense in the third degree.

[3] Appellant refers to Swift as a SAFE Nurse. However, the Code of Maryland Regulations (COMAR) uses the term "forensic nurse examiner".

[4] At trial, Swift testified that such a vaginal injury usually heals within a 72-hour timeframe.

Pretrial Proceedings

On May 9, 2016, prior to jury selection, the trial court held a hearing on appellant's motions *in limine*, which sought to exclude Swift's testimony relating to S.B.'s statements on the grounds of hearsay and Confrontation Clause violations. Swift, called as a witness by the State, testified to her examination of S.B. and statements made by S.B. during the course of the exam. On cross-examination by appellant's counsel, Swift testified:

> Q: And that she was, a head-to-toe was done by a doctor before you—
> A: Yes, they do a quick head-to-toe, yes.
> Q: A quick head-to-toe?
> A: Yes.
> Q: Okay. And then you take her to investigate her sexual, evidence of a sexual assault, correct?
> A: . . . no, not completely. We take them—the program that I work for at Shady Grove has been there 20 years, so the doctors had to defer to us for speaking to the patients and doing . . . a more thorough exam of their genital area.
> Q: . . . when you took her from the doctor, what did he or she tell you about a concern that he or she had about her physical?
> A: I actually didn't speak with the doctor, I spoke with the nurse and just asked if she was . . . cleared to go with me.
> Q: Okay. Because the medical portion of her encounter is over then, correct?
> A: Yes, for the emergency room physician, yes, not for us.
> Q: Okay. So you also testified that you told her, I'm just interested in the medical components. Did you use the word component?
> A: Not to her.
> Q: Okay.
> A: For a child, I tell them I want to make sure that their body is okay.

At the conclusion of the hearing, the trial court denied appellant's motions, finding S.B.'s statements to Swift were not testimonial and were made for medical—not forensic—purposes. The trial court then proceeded to select the jury.

The Trial

The State called Swift as its first witness who was admitted, over objection, as an expert in "pediatric forensic nurse examination." She testified at length about her interaction with S.B. on November 19, 2015. At the beginning of the examination, Swift stated she had S.B. sit on an exam table and introduced herself. S.B. responded by asking "if [Swift] was going to give her a shot," to which Swift answered, "No." Appellant's counsel objected and the trial court overruled. Swift stated she asked "if there was anything [S.B.] wanted to talk about."

Swift testified S.B. responded with the following statements: "she had been at her grandparents' house that day before school";[5] "she had been in her grandparents' room and that her grandfather was watching inappropriate videos on his phone"; she described the videos as pornographic; "her grandfather had put his [privates][6] in her mouth or attempted to put his [privates] in her mouth"; "her grandfather had kissed her in the middle of her bottom and his private had touched her bottom"; "he had touched her private area…with his hand" and also "touched her private with his private"; she "was very upset about the videos; "she was concerned about her bottom"; and she asked Swift "to look at her bottom." Swift further testified she asked S.B. "if she saw anything come out of her grandfather's private" and S.B. responded "that her privates were sticky." A transcription of S.B.'s statements, prepared by Swift, based on Swift's handwritten notes taken during the examination was admitted by the trial court over the objection of appellant's counsel.

[5] At this point, appellant's counsel objected and was overruled.

[6] Swift originally used the term "penis," but then clarified S.B. actually used the word "privates."

The State also called Pablo Batres, S.B.'s maternal grandfather; Melvin Alvalar, a Montgomery County Police Department Special Victims Unit detective who spoke Spanish and had interrogated appellant (who does not speak English); and Alex Douglas, the Spanish interpreter who prepared the translation and transcription of the interrogation. Appellant's interrogation statement, which included inculpatory admissions,[7] was admitted into evidence, over objection.

Appellant called one witness, Detective Timothy Beardsley, the lead detective on the case. He stated that on November 19, 2015, Child Protective Service contacted him and informed him S.B. had disclosed to school officials she may have been sexually assaulted. He and a CPS social worker interviewed S.B. in his office, where S.B. indicated she had been touched by both her grandfather and her father.

[7] Appellant's admissions included:

- "And she also saw me watching a porno movie. Porno."
- "Well, I only molested her."
- "Two times. Yes, I touched her vagina two times…with my hand, yes."
- "I have to be honest and tell the truth about what happened. It's true that I touched her, everything is true. But there has been no sex, nothing. That is true."
- **Detective:** She has touched your penis?
  Appellant: Yes, two times. Yes, it's been two times that she has touched me.
  Detective: How, eh…when was the last time it happened?
  Appellant: That Thursday. Thursday…yes, that Thursday she touched my penis.
- **Detective:** That you've touched her with your penis?
  Appellant: Yes. I touched her. I touched her thing, yes…that was one time. It was one time...yes, I touched her on top.
  Detective: With your penis, right?
  Appellant: Yes, yes. Yes.

Appellant elected not to testify and moved for judgment of acquittal based on insufficiency of the evidence. The trial court denied the motion, proceeded with jury instructions, and counsel presented their closing arguments. Following deliberations, the jury found appellant guilty of one count of sex abuse of a minor and one count of third degree sex offense (touching S.B.'s buttocks with his penis). Appellant was found not guilty of one count of third degree sex offense (touching S.B.'s buttocks with his mouth) and two counts of second degree rape. Appellant brought this timely appeal.

STANDARD OF REVIEW

We review "the ultimate question of whether the admission of evidence violated a defendant's constitutional rights without deference to the trial court's ruling." *Taylor v. State*, 226 Md. App. 317 (2016) (citing *Hailes v. State*, 442 Md. 488, 506 (2015) (applying *de novo* standard of review to an appeal based on the Confrontation Clause)).

Additionally, "we will not disturb the trial court's evidentiary rulings absent error or clear abuse of discretion." *Thomas v. State*, 429 Md. 85, 97 (2012). Likewise, trial courts enjoy "wide discretion" in striking jurors for cause. *Morris v. State*, 153. Md. App. 480, 501 (2003). As such, we also review the trial court's failure to strike jurors for cause for abuse of its discretion. *Id.*

DISCUSSION

1. Whether the trial court violated appellant's constitutional right to confrontation by admitting S.B.'s statements.

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

against him," and applies to the state governments through the Fourteenth Amendment. *See Pointer v. Texas,* 380 U.S. 400, 403 (1965); *see also* Article 21 of the Maryland Declaration of Rights. In 2004, the Supreme Court decided the seminal case *Crawford v. Washington*. 541 U.S. 36 (2004). Crawford was arrested for stabbing a man who allegedly raped his wife. *Id.* at 38. During his assault and attempted murder trial, prosecutors sought to admit a tape recording of his wife, wherein she suggested, contrary to her husband's testimony, the stabbing victim was not holding a weapon. *Id.* at 38–39. The wife did not testify, having invoked her marital privilege. *Id.* at 40. The trial court admitted the evidence over objection and the recording was played for the jury. *Id.* Crawford was convicted of assault and appealed. *Id.* at 41. The Supreme Court granted certiorari to determine whether the State's use of the recordings violated the defendant's rights under the Confrontation Clause. *Id.* at 42.

In examining the historical background of the right to confrontation, the Court noted "the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id*. at 50; *see also State v. Webb,* 2 N.C. 103 (1794) (holding a deposition taken in absence of the defendant, an alleged horse thief, was error, as "the common law, founded on natural justice [states] that no man shall be prejudiced by evidence which he had not the liberty to cross examine"); *State v. Campbell,* 30 S.C.L. 124 (1844) (excluding a deposition taken by a coroner outside the presence of the accused).

The Court defined "witnesses" against the accused as "those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (citing 2. N Webster, An American Dictionary of the English Language (1828)). "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Thus, the Court held, where *testimonial* evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

The Court listed "[v]arious formulations of this core class" of statements that qualify as testimonial:

> ***[E]x parte* in-court testimony** or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; **extrajudicial statements contained in formalized testimonial materials,** such as affidavits, depositions, prior testimony, or confessions; **statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.**

Id. at 51–52 (internal citations and quotations omitted) (emphasis added). The Court, however, declined to provide a precise definition of "testimonial." *Id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

Less than a year later, the Court of Appeals wrestled with the meaning of "testimonial" in *State v. Snowden*. 385 Md. 64 (2005). That case involved three young

girls, between the ages of 8 and 10, who were sexually abused at the home of their after-school care provider, Vicki P., by a man staying there as a guest. *Id.* at 68–69. The children told Vicki about the assault and she called the police, after initially confronting the man, Snowden, by telephone. *Id.* at 69. "A joint investigation by the Montgomery County Police Department and the Child Protective Services [CPS] for Montgomery County resulted." *Id.* At the request of a detective, a CPS sexual abuse investigator, Abdul-Wakeel, interviewed the three children. *Id.* The interviews were conducted at the Juvenile Assessment Center,[8] with the detective present, and Snowden was soon arrested. *Id.* at 69–71. Wakeel testified at trial and, "[b]ased largely on [her] testimony," Snowden was convicted of child abuse and six counts of third degree sexual offense. *Id.*

The *Snowden* Court held, regarding the CPS interview, that "an ordinary person in the position of any of [the children] would have anticipated the sense that [the children's] statements to the sexual abuse investigators potentially would have been used to 'prosecute' Snowden." *Id.* at 84. The interview questions and 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." *Id.* Thus, the Court held the statements to be testimonial and wrongfully admitted at trial where the requirements of *Crawford* were not met. *Id.* at 92. In so deciding, the Court considered not only the "intentions of the declarant, but also [the] intentions of the person eliciting the

[8] The Juvenile Assessment Center, as the Court of Appeals noted, was a County-owned facility with an "express purpose" of "[providing] a controlled and structured environment for the questioning, or interrogation, of the children about their accounts of a possible crime."

statement." *Id.* at 90. They found, "most telling," the facts that the CPS investigator's "participation in [the] matter was initiated, and conducted, as part of a formal law enforcement investigation." *Id.* at 84. The Court noted Wakeel "began her investigation with a police report in hand, which stated 'Michael Snowden had sexually abused these children'"; the detective was present during the interview; and the children told Wakeel they were aware of the true purpose of the interview and had actual awareness that Snowden's conduct was illegal. *Id.* at 84–85. Moreover, the "express purpose of bringing the children to the facility to be interviewed was to develop their testimony for possible use at trial." *Id.* at 85.

The Court acknowledged "some courts, post-*Crawford* have found statements admissible as nontestimonial hearsay because they were made to a physician in the course of seeking and receiving medical treatment," but dismissed the State's argument that the "therapeutic nature" of the interview renders it nontestimonial. *Id.* at 91–92. The children were "brought into the interview facility not so much for a non-investigatory purpose, such as medical or psychological treatment, but rather to assist and develop an investigation initiated by the [police]." *Id.* ("We leave to another day the question of whether such non-investigatory statements would be admissible in light of *Crawford*").

In *Davis v. Washington* and *Hammon v. Indiana*, decided together, the Supreme Court considered whether the Confrontation Clause applies to statements made by victims of domestic abuse to law enforcement. 547 U.S. 813 (2006). *Davis* involved statements made to a 911 operator shortly after the declarant was assaulted by her ex-boyfriend. *Id.*

at 817-19. In *Hammon*, the victim made a written statement to law enforcement, while inside of her home, and after she was separated from her alleged abuser. *Id.* at 819–20.

The Supreme Court held the statements in *Davis* were admissible because they were nontestimonial, made "under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency." *Id.* at 823. In its analysis, the Court emphasized that the declarant "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events"; "any reasonable listener would recognize that [she] was facing an ongoing emergency"; the "nature of what was asked and answered…were necessary to be able to *resolve* the present emergency, rather than simply to learn…what had happened in the past"; and the interaction was "striking[ly]" less formal than the police interrogation involved in *Crawford*. "[The victim] was seeking aid, not telling a story about the past." *Id.* at 831.

Conversely, the Court found the statements in *Hammon* to be testimonial, thus violating the Confrontation Clause, pointing to the facts that the investigating police officer admitted the interrogation was "part of an investigation into possibly criminal past conduct," there was no emergency in progress, and the victim was "actively separated" from her alleged abuser prior to the interrogation. 547 U.S. at 814–15. "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." *Id.* at 829.

In *Michigan v. Bryant,* the Supreme Court considered statements made to police officers, by a victim who was discovered mortally wounded in a gas station parking lot,

that identified and described the alleged shooter. 562 U.S. 344 (2011). The Court held the statements were nontestimonial, stating that "the circumstances of the interaction…objectively indicate that the 'primary purpose of the interrogation' was to 'enable police assistance to meet an ongoing emergency.'" *Id.* at 349. The Court also noted "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 358. Confrontation Clause analysis requires courts to consider "all of the relevant circumstances." *Id.* at 369.

In *Ohio v. Clark*, the Supreme Court applied "what has come to be known as the 'primary purpose' test." 135 S. Ct. 2173, 2180 (2015). There, a pre-school teacher noticed marks on her three-year-old student, who identified Clark as his abuser. *Id.* at 2177. Clark was arrested and, at his trial, prosecutors introduced the child's statements without the child testifying.[9] *Id.* The Court held that in light of "all the relevant circumstances," the child's statements "clearly were not made with the primary purpose of creating evidence for Clark's prosecution." *Id.* at 2181. The Court noted that "statements to persons other than law enforcement officers…are much less likely to be testimonial than statements to law enforcement officers" and stressed the fact the child's "statements occurred in the context of an ongoing emergency involving suspected child abuse." *Id.* at 2181. "Because the teachers needed to know whether it was safe to release [the child] to his guardian at the end

[9] The State relied on an Ohio law that declared children under 10 "incompetent to testify if they 'appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.'" *Clark*, 135 S. Ct. at 2178 (citing Ohio Rule Evid. 601(A) (Lexis 2010)).

of the day, they needed to determine who might be abusing the child." *Id.* at 2181. The teacher's questions and the child's responses were "primarily aimed at identifying and ending the threat." *Id.*

The Court found there was "no indication" the primary purpose of the interaction was to gather evidence for a future trial, noting the child "never hinted that he intended his statements to be used by the police or prosecutors." *Id.* The conversation, moreover, was "informal and spontaneous." *Id.* The Court specifically considered the child's young age in their holding that the statements were nontestimonial, providing:

> [The child's] age fortifies our conclusions that the statements in question were not testimonial. *Statements by very young children will rarely, if ever, implicate the Confrontation Clause.* Few preschool students understand the details of our criminal justice system. Rather, 'research on children's understanding of the legal system finds that' young children 'have little understanding of prosecution.' Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* 7, and n. 5 (collecting sources). And Clark does not dispute those findings. *Thus, it is extremely unlikely that a 3-year-old child in [his] position would intend his statements to be a substitute for trial testimony.* On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

Id. at 2181–82 (emphasis added).

In the case at hand, appellant argues the trial court erred by admitting the hearsay statements of S.B., "without ever calling [her] to testify," thus violating his Sixth Amendment right to confront adverse witnesses. He claims Swift's duties as a forensic nurse examiner are largely concerned with collecting evidence to be used at a criminal trial, the circumstances under which the statements were made "would lead an objective witness to reasonably believe that the statement[s] would be available for use at a later trial, and

the examination occurred during the course of a criminal investigation, not "because of a medical exigency."

It is true, as appellant suggests, a forensic nurse examiner's duties include collecting evidence.[10] However, forensic nurse examiners are also responsible for tasks not necessarily related to the collection of evidence, such as providing "immediate health interventions," making referrals to other health care personnel, and "providing immediate crisis intervention." COMAR 10. 27. 21. 04. Swift testified her responsibility with S.B. was to conduct a complete pediatric examination.

Moreover, the case law is clear that "statements to persons other than law enforcement officers…are much less likely to be testimonial than statements to law enforcement officers." *Ohio v. Clark*, 135 S. Ct. at 2181. Swift was a registered nurse employed by a private hospital rather than a detective, crime lab analyst, or similar government employee who worked exclusively for the purpose of collecting evidence, like in *Snowden*.

As directed by the Supreme Court in *Ohio v. Clark*, in determining whether statements are testimonial, we must consider "all the relevant circumstances" and ascertain whether S.B.'s statements were "made with the primary purpose of creating evidence for

[10] Duties of a forensic nurse examiner include performing forensic examinations on victims and alleged perpetrators in connection with physical, sexual, or domestic assaults; preparing and documenting the assault history interview; performing forensic evidentiary physical assessments; completing physical evidence kits provided by law enforcement; gathering, preserving, handling, documenting, and labeling forensic evidence; maintaining a chain of custody; participating in forensic proceedings; and interfacing with law enforcement officials. COMAR 10.27.21.04.

[appellant's] prosecution." If the primary purpose of the interaction was for some other reason, then the statements are nontestimonial and the Confrontation Clause is not implicated.

One of the relevant factors is whether a reasonable person in the position of S.B. would believe her statements were being elicited in order to collect evidence to be used in a later criminal trial. *State v. Snowden*, 385 Md. 64, 83 (2005). As previously noted, the Supreme Court has held "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause" because young children do not "understand the details of our criminal justice system." *Ohio v. Clark*, 135 S. Ct. at 2181–82. S.B. was only nine years old at the time of the interaction. Further, S.B.'s grandfather, not the police, brought her to the general hospital.[11] Once at the hospital, S.B. was examined briefly by a doctor in the Emergency Department (ED) then accompanied to a separate examination room "connected to" the ED by a registered nurse. The nurse was wearing clothes typical of hospital or medical personnel[12] in an examination room with medical supplies and

[11] **The State:** On November 19, 2015, did you take [S.B.] – at some point, you took her to Shady Grove Hospital?
Pablo/Maternal Grandfather: Yes, I was called from the school.
The State: Okay. Don't tell me what anyone told you. Do you remember taking her –
Pablo: Yes, I remember taking her to Shady Grove Hospital.
The State: Was anyone with you?
Pablo: No, ma'am.

[12] At trial, the following exchange occurred:
The State: What were you wearing, do you remember?
Nurse Swift: Typically when I come in, I wear one of two things. I either wear my hospital-issued scrubs, which are royal blue and have an embroidered RN on the chest, or if I'm in street clothes, I wear a white lab coat with a stethoscope and my badge.
The State: So you don't remember specifically?

equipment, including an examination table, blood pressure machine, and gynecological stirrups.[13] Thus, there was little, if any, indication that S.B.'s statements were being elicited for the purpose of collecting evidence.

Additionally, unlike *Snowden*, where the interview was initiated by the police, conducted at a state facility dedicated to interrogation of potential child sex abuse victims, police were present during the interview, and the investigator "began her investigation with a police report in hand [stating the defendant] had sexually abused [the] children," the police participation in the present case is much more attenuated. 385 Md. at 69, 84. Here, the exam took place at a hospital, no police were present in the examination room, Swift did not have a police report, and, in fact, Swift testified she "never met" Detective Beardsley.

Appellant contends the examination occurred during the course of a criminal investigation, not "because of a medical exigency." We disagree. S.B. was brought to the hospital shortly after indicating to teachers she had been sexually abused earlier in the day. While there, S.B. presented physical symptoms, including an abrasion in her vaginal area and other findings consistent with sexual assault,[14] and Swift administered medical

Nurse Swift: I know I had my badge on, but that's about as specific as I can remember for that.

[13] **The State:** What does the exam room look like?

Nurse Swift: There's an exam table, there's a vitals machine for blood pressure, there's an overhead light, a table, like a desk with a chair, and there's a computer in there.

[14] Nurse Swift testified that S.B. had a hymen "very small in width," which was an "abnormal finding", and she conducted a perianal exam of S.B., revealing an "immediate opening, to the rectum measuring about 4 centimeters in length or width with no stool." She further attested when she touched S.B's genital area with a Q-Tip, S.B. responded "ow," indicating S.B. was in pain.

attention. Swift testified such vaginal injuries heal within 72 hours, corroborating that S.B. had recently been sexually abused.

Appellant's argument that the purpose of S.B.'s interaction with Swift was not primarily medical because S.B. was seen by a doctor immediately prior is without merit. Swift testified the doctor who initially saw S.B. merely conducted a cursory "head to toe [or] scans." S.B. was then immediately brought to the examination room, which was itself attached to the Emergency Department. In our view, the initial doctor's exam served merely a "triage" function, briefly examining S.B. to determine what immediate medical treatment may be needed. *Contra Green,* 199 Md App. 386 (2011) (holding testimonial the statements of a declarant-victim who had already been provided medical care, stabilized, and released from a hospital, then brought to a "Sexual Assault Center" to be interviewed).

We conclude a reasonable person in S.B.'s position would not believe the primary purpose of the interaction was to collect evidence, but rather to acquire medical attention and treatment in response to an ongoing emergency. Accordingly, S.B.'s statements were nontestimonial and not subject to constitutional protection under the Confrontation Clause.

2. Whether the trial court erred by admitting S.B.'s hearsay statements under the medical treatment or diagnosis exception to the rule against hearsay.

Appellant next contends the trial court erred in admitting S.B.'s hearsay statements under the medical treatment or diagnosis exception to the rule against hearsay. He argues there was "no medical reason for the examination," S.B. had "already been fully examined and cleared by a doctor," and Swift's "justification for her independent examination on the

basis that she is 'trained in forensic interviewing and…the collection of evidence,' patently demonstrates that the exception does not apply in this case." He maintains, in determining whether a hearsay exception applies, the relevant state of mind is the declarant's and there is "[n]othing in the record [to suggest] that S.B. had been complaining of pain or physical discomfort," no evidence S.B. was abused on that specific day, and S.B.'s own response that "'she was worried about her grandfather…because he was watching inappropriate videos' manifests an understanding the encounter was not for the purpose of medical treatment." Appellee contends S.B.'s statements to Swift "fall squarely within the exception."

> Maryland Rule 5-803(b)(4) excepts from the rule against hearsay any:
>
> > [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 admission of such statements is that "the patient's statements to [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." *Candella v. Subsequent Injury Fund*, 277 Md. 120, 124 (1976). "Only statements that are both taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes fit within [the exception]." *Webster v. State*, 151 Md. App. 527, 537 (2003).

State v. Coates, cited by both parties in their briefs, discussed in-length whether the hearsay statements of an underage victim of sexual assault, made to a forensic nurse practitioner during a medical examination, were admissible under the medical treatment or diagnosis exception. 405 Md. 131 (2008). In that case, a seven-year old victim, J.T., was examined by a nurse practitioner approximately fourteen months after the alleged assault occurred and three weeks after she disclosed the abuse to her mother. At that time, J.T. was not experiencing any physical injury or pain from the attack. The Court of Appeals found the nurse had a "dual purpose" for examining J.T., both a "legally cognizable present medical reason" and "a forensic purpose." *Id.* at 143. However, the Court held "the overarching purpose was forensic in nature," and, "more important…it is unlikely that [J.T.] believed that there was a medical purpose for [the] examination." *Id.* at 144. Because "there was no emergency situation" and "[J.T.] did not present with any symptoms at the time of her examination," the Court "[could not] say that [J.T.] had the requisite motive for providing the type of sincere and reliable information that is important to diagnosis and treatment," and, therefore, held the lower court erred.

The present case is distinguishable from *Coates*. As discussed above, the record contains evidence S.B. was sexually assaulted and, later that day, brought to the hospital. The exam's purpose was to more fully examine S.B.. Swift testified S.B. presented physical symptoms indicating she had recently been sexually assaulted, stating she had "an abrasion that started from the posterior fourchette…going inward into the vagina"; Swift touched the area with a Q-tip and S.B. responded "ow," indicating she was in pain; S.B.

had a hymen "very small in width," which was an "abnormal finding"; and she conducted a perianal exam of S.B., revealing an "immediate opening, to the rectum measuring about 4 centimeters in length or width with no stool." Moreover, S.B.'s statements to Swift indicate S.B. believed the purpose of the examination was medical treatment. Specifically, S.B. asked "if [Swift] was going to give her a shot"; stated "she was concerned about her bottom"; and requested Swift "look at her bottom." In light of these facts, we hold the trial court did not err in admitting S.B.'s statements under the medical treatment or diagnosis exception to the rule against hearsay.

3. Whether the trial court erred in declining to strike three jurors for cause.

Appellant lastly contends the trial court erred in refusing to strike three potential jurors (*i.e.* Jurors 141, 170, and 232) for cause, despite each "pointedly expressing a preexisting bias." He avers that these jurors "expressed an inability to be fair and impartial and never affirmed unequivocally that they would decide the case only on the facts presented." As such, appellant maintains a new trial is warranted. Appellee, on the other hand, argues the trial court acted within its discretion in ruling the potential jurors in question were competent to serve.

In Maryland, the purpose of voir dire "is to ensure a fair and impartial jury by determining the existence of a [specific] cause for disqualification." *Pearson v. State*, 437 Md. 350, 356 (2014). Thus, a trial court need not ask a voir dire question "not directed at a specific [cause] for disqualification [or that is] merely 'fishing' for information to assist in the exercise of peremptory challenges." *Id.* at 357. The trial court is required to ask a

question "if and only if…reasonably likely to reveal [specific] cause for disqualification." *Id.* (internal citation and quotation omitted).

The trial court enjoys wide discretion in excusing jurors for cause because the "[t]rial court is in the best position to assess a juror's state of mind, by taking into consideration the juror's demeanor and credibility." *Id.* "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption [of impartiality] would be to establish an impossible standard[, rather] *[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Calhoun v. State,* 297 Md. 563, 580 (1983) (emphasis in original) (*quoting Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

In *Morris,* we considered whether the trial court properly exercised its discretion in declining to strike three jurors for cause. Juror 457, a Baltimore City police officer, indicated an "initial tilt in favor of the prosecution," but stated he "would be fair." When asked whether his association with the state's attorney would "in any way affect your ability to be fair," Juror 457 replied, "Oh no, no. Heavens, no." Juror 505 worked for the Division of Corrections and informed the trial court her sister had been kidnapped and raped. At first, when asked if she could be fair, she responded, "I don't know." But, ultimately, she stated she could make a decision "based on the evidence without any bias." Juror 521 had "two brothers that [were] gunned down in the street" and originally indicated he might be biased against the defendant. Upon further questioning, however, he admitted "he probably could keep an open mind until he had heard all of the evidence." In declining

to strike Juror 521, the judge observed "the more we talked, the more [Juror 521] appeared to be understanding the requirement of being fair and impartial." We held that, although their "initial responses…were at least enough to make sensitive antennae quiver," because of the "answers they ultimately gave, the three prospective jurors in question were not challengeable as a matter of law." As such, the trial court "did not abuse the wide discretion entrusted to him" in finding the potential jurors impartial in accordance with Sixth Amendment and declining to strike them for cause.

The present case is analogous to *Morris*. During jury selection, the following exchange occurred involving Juror 141:

> [The Court]: Hi. You said that you're employed in the area of law enforcement or other governmental agency related to criminal justice?
> [Juror 141]: Yes. For three years, I was the chief of staff to the chair of the U.S. Sentencing Commission and then ran the commission as the executive director for seven years after that. During that time, we did take a number of crime bills into consideration, including at least four working groups that I had, on sex crimes against minors and have worked with the Federal Corrections Agency regarding specific sex crimes against minors.
> [The Court]: What do you do now?
> [Juror 141]: I am now the Clerk of the Bankruptcy Court.
> [The Court]: Which one?
> [Juror 141]: Philadelphia, Eastern District.
> [The Court]: And what are you doing here?
> [Juror 141]: My wife and children are here, so my wife decided after yes [sic] she'll go back to Philly, she said she likes Montgomery County, so I live here and commute to Philadelphia and take care of my elderly parents up there. It's a little bit of an adventure. You let me stay home for a day or two, maybe more, I don't know. We'll see.
> [The Court]: Where'd you go to law school?
> [Juror 141]: University of Pennsylvania in Philadelphia.
> [The Court]: Is there anything about your previous experience that would make you not be able to be fair in this case?

> [Juror 141]: I think my knowledge of sex crimes, particular against minors, if I heard something that conflicted with it, I would struggle, but I would try to weigh the considerations if you have expert witnesses or whatever.
> [The Court]: If I gave you instructions and maybe my instructions conflicted with what you thought, would you be able to follow my instruction?
> [Juror 141]: To the best of my ability. You're a judge. I usually am a Clerk of the Court. I listen to judges.
> [The Court]: Thank you.

The trial court declined to strike Juror 141. During the *voir dire* of Juror 170:

> [The Court]: You raised your hand in response to the last question that you can't serve on this jury. Tell me why. Yesterday, when I asked is there any reason why you can't serve on the jury, you raised your hand.
> [Juror 170]: Oh, yes. I have some history of similar – when you mentioned the alleged cause of the trial.
> [The Court]: When I mentioned the what?
> [Juror 170]: The alleged cause. I had a similar, years ago, feelings about a certain situation in the past. That's why I raised my hand.
> [The Court]: Tell me about that.
> [Juror 170]: I was associated with a friend who was involved in an incestuous relationship, a forced incestuous relationship. I feel that I would be biased in the circumstance in this area.
> [The Court]: Would you be biased against the defendant?
> [Juror 170]: Not necessarily. I was just concerned yesterday it may have an influence.
> [The Court]: So you said your friend was involved in an incestuous relation [sic], and because of that, you think that would influence your decision in this case? Tell me how.
> [Juror 170]: Because of it would have just a negative connotation to the alleged – I don't know what it's called, the crime, the crime in relation to that.
> [The Court]: So do you think you would be unable to listen to all of the testimony and the evidence?
> [Juror 170]: I possibly could. I was a little concerned it might be disturbing to me.
> [The Court]: But you did raise your hand that you might allow pity, anger, sympathy or other emotions – is that what we just talked about?
> [Juror 170]: Yes, Your Honor.
> [The Court]: And you said that you or somebody in your family or a friend had been a witness, victim or accused of a crime. Is that you or somebody else?

> [Juror 170]: That was someone else.
> [The Court]: And who was that?
> [Juror 170]: That was a girlfriend of mine associated with the same. It's all in the same area. So that was associated with the improper relationship that she had at that time.
> [The Court]: Was your girlfriend the adult having the improper relationship?
> [Juror 170]: No. It was her father, and she was the daughter associated with that relationship. She wasn't an adult at the time.
> [The Court]: She wasn't what?
> [Juror 170]: She wasn't an adult at the time. She was a child.
> [The Court]: What do you do?
> [Juror 170]: I work for the Department of the Navy, civil side.

After appellant's counsel moved to strike for cause, the trial court denied the motion. Finally, Juror 232 was involved in the following exchange:

> [The Court]: Hi. You raised your hand in response to the question that due to the nature of the charges, you would not be able to listen and render a fair and impartial verdict. Do you still believe that?
> [Juror 232]: Yes.
> [The Court]: Why?
> [Juror 232]: I think – I'm sorry, can you repeat the last part of it?
> [The Court]: The question was based solely on the nature of these charges, you would not be able to listen to the testimony and other evidence and render a fair and impartial verdict based solely on the evidence.
> [Juror 232]: Could I say because there is an emotional aspect of it?
> [The Court]: Well, you can say, but does that mean you can't listen to everything that goes on before rendering a decision? I mean, this is an emotional type case, so it's understandable that people might feel strongly about it, but could you listen and be fair?
> [Juror 232]: I could listen. It definitely would be emotional.
> [The Court]: But could you be fair to the defendant?
> [Juror 232]: I think so.
> [The Court]: What?
> [Juror 232]: I could say yes, I'd try my best.
> [The Court]: Thank you.

None of these potential jurors affirmatively stated they had a bias against either party or would be unable to properly reach a verdict based on the evidence. While there

may have been some initial doubts expressed by the jurors as to their impartiality, the trial court, as shown by the record, effectively questioned each potential juror about their possible biases and concluded they were impartial. In light of Maryland's "limited voir dire approach" and the trial judge's unique position to view a juror's demeanor and credibility, we conclude the trial court was well within its broad discretion. As such, we hold the trial court did not commit an abuse of discretion in declining to strike Jurors 141, 170, and 232 for cause.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.