Circuit Court for Calvert County
Case No. 04-K-16-000226

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2135

September Term, 2017

DIANDRA NOEL WARD

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Thieme, Raymond G.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 11, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a jury trial in the Circuit Court for Calvert County, Diandra Noel Ward, appellant, was found guilty of first and second-degree child abuse. She was sentenced to twenty-five years' imprisonment, with all but twenty years suspended, for first-degree child abuse. The remaining conviction was merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents three questions for our consideration, which we have rephrased slightly, as follows:

> 1. Did the trial court abuse its discretion in granting the State's motion in limine to redact statements from medical records, thereby impairing appellant's constitutional right to present a defense?
>
> 2. Did the trial court abuse its discretion in allowing the State to introduce records from the Office of Child Care?
>
> 3. Did the trial court err or abuse its discretion in admitting into evidence text messages sent by appellant?

For the reasons set forth below, we shall affirm.

FACTS AND PROCEEDINGS

This case arises out of allegations that appellant committed child abuse against an infant, J.M., who was born in December 2015. J.M. lived with his mother, V.B., his father, D.M., V.B.'s son from a prior relationship, P.G., and D.M.'s daughter from a prior relationship, S.M. At all times relevant to this case, P.G. was approximately eight years old and S.M. was approximately eleven years old. P.G. and S.M. were allowed to hold J.M. if they were sitting on a couch and their mother or father were present, but they were not permitted to watch him by themselves. With the exception of a respiratory infection

and nasal congestion, J.M. was a healthy baby and his parents had no concerns about his development.

On February 1, 2016, J.M. entered First Steps, a licensed daycare center appellant operated in her home in Calvert County. There were six children, including J.M., in appellant's care at First Steps.[1] Appellant used a cellular phone "app" and text messages to keep V.B. apprised of J.M.'s activities throughout the day, including his eating and sleeping habits. Prior to April 15, 2016, J.M. did not have any notable injuries, difficulty breathing, or problems opening or tracking with his eyes. He was able to hold his head up and hold items in his hands.

On the evening of April 14, 2016, J.M. ate normally and slept through the night. The following morning, V.B. took J.M. to appellant's daycare facility. Typically, she would take J.M. out of his car seat, sign in, hug and kiss him, and then hand him over to appellant. When saying goodbye, V.B. would put J.M. "in [her] face and love on him and kiss him." She described holding him in the air and giving him "a shimmy." On April 15, 2016, V.B. received updates from appellant throughout the day, informing her that J.M. had, among other things, consumed baby formula, napped, and had dirty diapers.

At 3:03 p.m., V.B. received a telephone call from appellant asking how fast she could get to the daycare because J.M. was not waking up. When V.B. arrived about fifteen minutes later, she saw an ambulance outside the house. Inside the house, she saw J.M. lying on a couch in his diaper making a "screaming," "screeching" noise that she had never

[1] There was no evidence that P.G. or S.M. were ever present at appellant's daycare.

heard before. J.M. was placed in the ambulance and V.B. rode with him to Calvert Memorial Hospital. During the ride to the hospital, appellant and V.B. exchanged text messages. When paramedics asked V.B. if J.M. had hit his head, she sent a text message to appellant. Appellant responded that J.M. hit his head "just when I took him out of the car seat earlier, but nothing major[.]"

Katie Krieder, a critical care transport team paramedic for Children's National Medical Center in Washington, D.C. ("Children's National"), and a volunteer paramedic, was dispatched to the daycare at 3:28 p.m. to provide pediatric equipment and an increased level of care for J.M. When she arrived, J.M. was in the ambulance secured to a stretcher. She placed him on a cardiac monitor and checked his vital signs. She observed that J.M. was mostly unresponsive, that he had waxing and waning mental status, that he would not respond to pain, and that he would cry, then become unresponsive, and then cry again. In her report, Ms. Krieder wrote that, in light of the waxing and waning mental status and the absence of a fever or signs of sepsis, there was a strong suspicion of a head injury or brain bleed.

The ambulance took J.M. to Calvert Memorial Hospital, where he was placed in a neck brace, intubated, and received a CAT scan. He was then flown to Children's National, where he was treated by a pediatric neurosurgeon, Dr. Suresh Magge. Dr. Magge reviewed the CAT scan from Calvert Memorial Hospital, which showed blood and fluid on the right side of J.M.'s brain that was creating a midline shift, pushing the brain to the left and increasing pressure on it. In addition, Dr. Magge received a report that one of J.M.'s pupils had been "blown," meaning that it was very large, indicating an increase in pressure on the

brain stem. J.M. had been given medicine to temporarily decrease the pressure and, when he arrived at Children's National, his pupil was "back down again." According to Dr. Magge, J.M. was "basically in a coma" and had life-threatening injuries.

Dr. Magge's initial diagnosis was an "acute on-chronic" subdural hematoma. Dr. Magge based his diagnosis on the CAT scan, which showed the presence of both new blood and old blood under the dural membrane, a strong membrane that covers the brain. Dr. Magge performed a craniotomy to evacuate the blood and fluid that were beneath J.M.'s dural membrane, and determined that J.M. had a subdural hematoma. As soon as Dr. Magge made small cuts in the dura during surgery, "blood and fluid came out under pressure." The fluid was a red mixture of blood and cerebral spinal fluid. Dr. Magge did not observe any old blood but only fresh blood that was clotting. According to Dr. Magge, the injury to J.M. was acute, as opposed to chronic, meaning it occurred "within generally a day or so." He explained that if the blood had been old or sitting for weeks or months, it would have been very thin and brown like motor oil. Dr. Magge did not see any old blood or other signs to suggest a chronic or congenital condition or injury affecting the right side of J.M.'s brain.

Dr. Magge did not recall observing any bruising or trauma to the exterior of J.M.'s skull, but opined that significant force would have been necessary to cause J.M.'s injury. He concluded that J.M.'s injury was consistent with abusive head trauma and could have been caused by shaking. Dr. Magge had never seen the type of injury J.M. suffered occur spontaneously and he ruled out the possibility that J.M. suffered from other conditions such as hydrocephalus or hygroma. In follow up appointments with J.M. after the surgery, Dr.

Magge observed that the blood clot and midline shift of the brain were gone, but there was lingering damage to the right side of J.M.'s brain.

Dr. Heather de Beaufort, a pediatric ophthalmologist at Children's National, examined J.M. on April 16 and 18, 2016. She found that there were twenty to thirty hemorrhages in the center and periphery of his right eye, but there were no hemorrhages in his left eye, which appeared normal. According to Dr. de Beaufort, bleeding in the peripheral area of the right retina could indicate abusive trauma. Dr. de Beaufort opined that J.M.'s condition was "most consistent with an abusive head trauma" caused by shaking. She stated that there was nothing in his medical treatment, and no other explanation for, the pattern of hemorrhages in his retina that extended into the periphery of his eye. Dr. de Beaufort acknowledged that shaking, with the possibility of a soft impact, also fit within her findings.

On April 15, 2016, Detective Meggan Quinn of the Calvert County Sheriff's Office and Janice Walker from Child Protective Services were dispatched to Children's National to investigate a possible case of child abuse. She interviewed J.M.'s parents and obtained a timeline of events leading up to the time of J.M.'s injury. The following day, Detective Quinn interviewed J.M.'s siblings, P.G. and S.M., and determined that they were not present for J.M.'s injury. Detective Quinn photographed appellant's home and the home of J.M.'s parents. She also obtained screen shots from the cell phone "app" that appellant used to keep V.B. advised of J.M.'s activities each day. Appellant consented to a recorded interview, which was played for the jury at trial.

Later on April 16th, appellant sent a text message to Detective Quinn stating that she had been speaking with her mother about how V.B. had shaken J.M. when she dropped him off at the daycare the previous day. Detective Quinn then contacted V.B., who demonstrated how she held J.M. by holding "both hands up in the air" and doing "like the airplane wiggle motion." Detective Quinn mentioned this to medical personnel, but she eventually ruled out J.M.'s parents as suspects in his abuse.

On April 28, 2016, Detective Quinn went to appellant's home to execute a search and seizure warrant for electronic evidence. She seized appellant's laptop computer and cell phone, and downloaded the contents of both at the Sheriff's Office. On June 24, 2016, the State charged appellant, by way of criminal indictment, with first and second-degree child abuse. The trial took place on May 15, 16, 18, and 19, 2017.

During appellant's trial, Dr. Allison Jackson, a child abuse pediatrician at Children's National, testified for the State as an expert in child abuse pediatrics. She opined that J.M.'s subdural and retinal hemorrhages were the result of an abusive head trauma, and not chronic subdural fluid in the brain. In determining the cause of the subdural and retinal hemorrhages, Dr. Jackson spoke with J.M.'s parents. She also reviewed, among other things, J.M.'s birth and pediatric records, EMT and hospital records, the CAT scan performed at Calvert Memorial Hospital, MRIs performed at Children's National, and the ophthalmology report. In addition, she spoke with Dr. Magge and conducted a physical examination of J.M. on April 18, 2016.

Dr. Jackson found that prior to April 15, 2016, J.M. was developing normally and that his head circumference was "average." She ruled out infection, underlying bleeding

disorder, metabolic disorder, and structural defect as the cause of his injury. According to Dr. Jackson, the periods of hypertension that J.M. experienced on April 15, 2016 and his unequal pupils were indicative of a head injury. She opined that "retinal hemorrhages are seen in about 80 percent of cases of abusive head trauma," that they can appear in one or both eyes, and that a distribution of retinal hemorrhages around the periphery of the eye, and not just in the back of the eye, is consistent with abusive head trauma. She explained that such hemorrhages would not be expected in cases involving a chronic illness or chronic subdural fluid in the brain. Dr. Jackson acknowledged that if the CAT scan or MRIs had revealed the formation of a membrane, such results could indicate that J.M. suffered from a chronic condition, but that was not the case. She explained:

> And so in the brain when there is a subdural hemorrhage, a membrane can develop in some cases, that kind of walled off scabbed, for lack of a better way of describing it, area. And so it's difficult to see membranes on CT scans, and MRIs are much better. And so our radiologists performed the MRI of [J.M.'s] brain, and one of the things that they were looking for was whether or not there was a membrane that would confirm that there was some chronic component, and there was no evidence of a membrane.

Dr. Jackson noted that there were no marks on J.M.'s skin and he had no fractures or skeletal abnormalities, but explained that abusive head trauma does not require external injuries:

> [T]he absence of signs of external trauma, meaning bruising to the head, signs of impact to the head, certainly decreases the likelihood for impact on hard surface, a floor, a wall, a table, but, again, as I just mentioned, that does not exclude the possibility that he was shaken and then tossed or thrown down on something that was soft. So I believe that [J.M.] was shaken, that he was shaken violently, and whether or not there was impact on a soft object remains a possibility.

Dr. Jackson testified that there was no history of accidental trauma serious enough to cause J.M.'s injury, and that bumping his head on a car seat handle could not have caused the type of injury he suffered. She further testified that neither the type of side-to-side movement, or "shimmy," V.B. demonstrated, nor a cold or congestion, nor a fall from a low-to-the-floor child swing could have caused J.M.'s injuries. In addition, it was unlikely, but not impossible, that "[a]ny young child," would have the strength required to cause the injury J.M. suffered. According to Dr. Jackson, J.M. would have exhibited symptoms "[i]mmediately," so his injury must have occurred sometime after his last normal behavior at the daycare on April 15, 2016.

For all of these reasons, Dr. Jackson rejected the notion that J.M. suffered from a chronic subdural hemorrhage and concluded, to a reasonable degree of medical certainty, that J.M. "suffered abusive head trauma resulting in subdural hemorrhage and brain injury, as well as retinal hemorrhages."

The sole defense witness was Dr. Joseph Scheller, an expert in pediatric neurology. After reviewing J.M.'s birth and pediatric medical records, hospital records, physical therapy records, EMT reports, and imaging scans, Dr. Scheller concluded that although J.M. had a subdural hemorrhage and a retinal hemorrhage in one eye, there was no evidence of child abuse, abusive head trauma, or a soft impact to his head. Instead, Dr. Scheller observed on J.M.'s CAT scan an abnormal membrane between his brain and skull. Dr. Scheller opined that J.M.'s body created that membrane to partition off excess fluid that did not belong between the brain and skull, a process that would usually take weeks or months. Dr. Scheller concluded that J.M. had a chronic condition that caused a subdural

hematoma to develop. In support of that conclusion, Dr. Scheller pointed to J.M.'s enlarging head circumference from the time of his birth to April 15, 2016.

Dr. Scheller explained that the bleeding J.M. experienced could have been caused by a fragile membrane, which could bleed on its own, or by the build-up of too much fluid which could cause blood vessels that traverse the skull to the surface of the brain to stretch and bleed. According to Dr. Scheller, it was "understandable" that J.M. had retinal hemorrhages in only his right eye because there was increased pressure on the right side of his brain that "clearly will congest any ability of the vein in the right eye to bring blood back to the heart via the brain." Dr. Scheller stated that he "would never consider shaking in a case like this" because "[y]ou can't shake half of the brain[,]" and "[s]oft impacts are not dangerous." According to Dr. Scheller, "it would be very understandable" that J.M. was irritable due to fluid accumulating in his brain.

In rebuttal, the State called Dr. Gilbert Vezina, the Director of Neuroradiology at Children's National, who was part of the team of doctors that cared for J.M. Dr. Vezina testified as an expert in pediatric neuroradiology. After reviewing J.M.'s MRI studies and CAT scans, he disagreed with Dr. Scheller that J.M. had a chronic subdural membrane. According to Dr. Vezina, the "membrane" Dr. Scheller saw was actually part of the normal arachnoid membrane that covers the brain and not something the brain developed to wall off a chronic injury. The only reason it could be seen on the scan was because there was some acute blood on it. Moreover, J.M. had acute hemorrhaging in three different locations of his brain. Dr. Vezina also rejected Dr. Scheller's opinion that only a small part of J.M.'s brain was injured because a follow-up exam on February 10, 2017, showed that the entire

right hemisphere of J.M.'s brain was smaller than the left hemisphere and had scarring. According to Dr. Vezina, J.M.'s injuries were common for patients who suffered abusive head trauma.

We shall provide additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant first contends that the trial court abused its discretion in granting the State's motion in limine to redact certain statements from J.M.'s medical records that, she asserts, were crucial to one of her theories of the case. Specifically, appellant argues that the jury should have been allowed to consider evidence that J.M.'s siblings, P.G. and S.M., made statements to an emergency room technician at Calvert Memorial Hospital indicating that they had considered harming J.M. We disagree and explain.

On April 15, 2016, while J.M. was being treated at Calvert Memorial Hospital, P.G. and S.M. sat with an emergency room technician. The unredacted medical records are not included in the record on appeal,[2] but in a proffer by defense counsel, it was revealed that S.M. "was initially mad about [V.B. and D.M.] having a baby," but "she is now glad." P.G. told the emergency room technician that he had thought "about throwing the baby down the stairs," and "said he had a pocket knife and wanted to slit the baby's throat." S.M. did not "seem surprised" by P.G.'s statement, and both children went on to speak about other

[2] The record includes the redacted version of the medical records which was marked State's Exhibit 2 at the motions hearing and was admitted into evidence at trial.

topics. The State proffered that the emergency room technician reported the children's comments to a child protective services worker who interviewed each child the following day. During his recorded interview, P.G. said that his statements related to the time his mother and D.M. announced that they were going to have a baby. He said he never did those things, did not plan to do them, and that he loved J.M. as soon as he was born.

At trial, the State sought to redact the children's statements from J.M.'s medical records on the ground that they were inadmissible under the hearsay exception set forth in Maryland Rule 5-803(b)(4) related to statements made for the purpose of medical diagnosis or treatment. The State argued that the children were not patients, that they did not subjectively believe they were speaking to the emergency room technician for the purpose of obtaining a medical diagnosis or treatment, and that they could be called as witnesses by the defense. The State also pointed out that the emergency room technician was not asked to diagnose, treat, or investigate the cause of J.M.'s injury.

The defense argued that the statements should not be redacted, stating:

> Clearly there is an investigation by medical personnel to determine, A, whether or not there is information that exists that would be pathologically germane and relevant to a diagnosis relative to treatment. And there is no good reason, aside from it being -- and it's prejudicial, it's prejudicial because it opens two more suspects in the case, two more suspects that had access to the child. But it is not inadmissible as irrelevant, and it's not being offered to prove the truth of the matter asserted.
>
> In fact, the State is offering the medical records in whole. I haven't had a case where the State has moved to redact its own medical records, but understanding the inflammatory content of the statements that were legitimately obtained, it is of no -- it's no surprise to me.

The trial court granted the State's motion in limine, thereby permitting the statements to be redacted from J.M.'s medical records, concluding that the children's statements were not "pathologically germane to the treatment of this child," and did not fall within the hearsay exception set forth in Rule 5-803(b)(4).

Appellant does not challenge on appeal the trial court's determination that the children's statements were inadmissible under Rule 5-803(b)(4). Instead, she contends that the "trial judge took an unduly narrow view, considering only one exception to the rule against hearsay and finding that it did not apply." She argues that the trial court could have determined that another exception to the rule against hearsay applied, specifically Md. Rule 5-803(b)(3),[3] and the court's "impetus to do so came from defense counsel's proffer as to what was needed to raise the defense that someone other than [appellant]may have harmed [J.M.]."

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[3] Maryland Rule 5-803(b)(3) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (b) Other Exceptions.
>
> * * *
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The short answer to appellant's contention is that she did not raise below the issue that the children's statements were admissible under the "state of mind" exception set forth in Rule 5-803(b)(3). The discussion between counsel and the trial judge was limited to the admissibility of the statements under the hearsay exception for statements made for the purposes of medical diagnosis or treatment. Because the admissibility of the children's statements under Rule 5-803(b)(3) was not raised in or decided by the trial court, it is not properly before us. Rule 8-131(a).

Even if the issue had been raised below, appellant would fare no better. It is clear that the children's statements were not offered to prove their current state of mind, as the statements pertained to their feelings about having a new sibling prior to J.M.'s birth. Nor were the statements admissible as statements of future action. The children spoke of how they felt in the past, not about what they intended to do in the future. Thus, even if the trial court had considered whether the children's statements were admissible under Rule 5-803(b)(3), those statements did not fall within the "state of mind" exception.

Similarly, we reject appellant's contention that the exclusion of P.G.'s and S.M.'s statements violated her constitutional right to present a defense. Appellant did not raise this issue below and, accordingly, it is waived. *See* Md. Rule 8-131(a); *Robinson v. State*, 410 Md. 91, 106 (2009) (noting that errors of constitutional dimension may be waived by failure to interpose a timely objection at trial); *White v. State*, 324 Md. 626, 640 (1991) (citing Rule 8-131(a) and holding that a claimed deprivation of the constitutional right to present defense witnesses was not properly before the Court because the argument was not raised before the trial court). The sole argument raised by the defense at trial was that P.G.'s

and S.M.'s statements to the emergency room technician were admissible under Rule 5-803(b)(4). The court did not err in rejecting that argument.

Finally, we note that appellant was not precluded from calling the children to testify at trial. Contrary to appellant's argument that "it is not entirely clear that the defense attorney could have obtained the testimony of the children," the transcript of the motions hearing makes clear that defense counsel wanted to subpoena P.G. to testify at trial and that the State had arranged for him to be served. That did not happen. As the State suggests, it is likely that P.G. was not called to testify at trial because appellant's defense was not that someone else caused J.M.'s injuries, but that they were caused by a chronic condition that made him prone to develop a subdural hematoma.

II.

Appellant next contends that the trial court abused its discretion in allowing the State to introduce into evidence records from the Maryland Department of Education's Office of Child Care. At a motions hearing on the first day of trial, defense counsel objected to the State's plan to introduce records from the Office of Child Care regarding licensing and inspection issues pertaining to appellant's daycare. Defense counsel argued that the documents should be excluded as a discovery sanction because they had not been produced by the State until twelve days before trial. He also asserted that the records were generated after April 15, 2016, the date of J.M.'s injuries, and therefore were not relevant. The State countered that it received the documents on May 3, 2017, and immediately provided them to defense counsel. Those documents included an April 19, 2016 statement by appellant to Stacy Modlin, a licensing specialist from the Office of Child Care, about what had

happened to J.M. four days earlier. The documents also included a statement by appellant that every room in her house had been licensed for daycare, that J.M. had been sleeping in a swing, and that he had been sleeping in a room that was not approved for sleeping. The State argued that both defense counsel and appellant were aware of the inspection and licensing issues pertaining to the daycare and of the existence of the documents, which the Office of Child Care provided directly to appellant.

The court ruled that it would allow evidence of violations that existed on April 15, 2016, the condition of the home, where J.M. was located within the home, and statements appellant made. The court did not allow evidence of problems or violations at the daycare prior to or subsequent to April 15, 2016. With respect to appellant's assertion of a discovery violation, the court stated:

> And by the way, just to finally address that, I found that there was no discovery violation because I really found that the State immediately upon receipt of the documents, they have a duty to provide ongoing discovery. They did just what they were supposed to do, they forwarded that information to [defense counsel], who did what he was supposed to do. He reviewed them, filed the appropriate motion relative to this case.

Appellant challenges the trial court's decision to admit portions of the records from the Office of Child Care on two grounds. First, she argues that the records "should have been ruled inadmissible in their entirety as a consequence of the violation of the rules governing discovery in criminal cases." She asserts that the trial judge failed to make an explicit ruling regarding compliance with the discovery rules, made no mention of sanctions, and abused his discretion by failing to find a discovery violation. Second, she argues that although the statements she made to Ms. Modlin about her care of J.M. on April

15, 2016, were admissible, other evidence of compliance with licensing regulations was irrelevant to the determination of whether she injured J.M., and erroneously placed before the jury "what was essentially 'bad acts' evidence." We disagree and explain.

A. Discovery Violation

We review whether a discovery violation occurred *de novo*. *Cole v. State*, 378 Md. 42, 56 (2003). The remedy for a discovery violation is, "in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice. Generally, unless we find that the lower court abused its discretion, we will not reverse." *Id.* (quoting *Williams v. State*, 364 Md. 160, 178 (2001)). An abuse of discretion occurs when the trial court acts in "an arbitrary or capricious manner" or "acts beyond the letter or reason of the law." *Johnson v. State*, 228 Md. App. 391, 433 (2016) (quoting *Brewer v. State*, 220 Md. App. 89, 111 (2014)).

This Court has declined to find discovery violations—much less sanctions—where discovery materials were disclosed near the start of trial. In *Joyner v. State*, the State "did not disclose the identity of its expert witness . . . until the prosecutor attempted to file that information with the circuit court and [Joyner's] counsel . . . eight days prior to trial." 208 Md. App. 500, 529 (2012). Although this Court recognized that the State was required to disclose the identities of its witnesses within thirty days of the appearance of counsel or the first appearance by the defendant pursuant to Rule 4-263(h), we nevertheless concluded that "the State fulfilled its 'continuing duty to disclose' by supplementing its discovery" pursuant to Rule 4-263(j). *Id.*; *see also Morton v. State*, 200 Md. App. 529, 542-44 (holding

that trial court did not abuse its discretion in declining sanctions despite State's disclosure of expert witness one week before trial).

Here, the prosecutor scanned and e-mailed the records from the Office of Child Care to defense counsel as soon as she received them, twelve days before trial. The prosecutor explained at the motions hearing that, based on conversations she had with the attorney representing appellant with regard to daycare licensing issues, she believed that defense counsel already possessed the records from the Office of Child Care. Nevertheless, she sent them to defense counsel in "an abundance of caution." The trial court found that the State provided the documents in a timely manner, and that there was no discovery violation. Because the State "fulfilled its 'continuing duty to disclose' by supplementing its discovery," the trial court did not err in finding no discovery violation. *Joyner*, 208 Md. App. at 529.

B. Relevance of Compliance with Licensing Regulations

Appellant contends that the trial court abused its discretion in admitting certain records from the Office of Child Care that did not pertain to how J.M. was injured on April 15, 2016. She acknowledges that the trial court properly admitted her statements to Ms. Modlin, the licensing specialist, about her care of J.M. on the date of the incident, but argues that the court erred in admitting other information from records dated April 19, 2016. Specifically, appellant points to part four of the summary of findings, in which Ms. Modlin wrote, "the child should not have been sleeping in a swing without permission or approval from the child's health care provider. Provider also does not have an audio/video monitor to allow for sight and sound monitoring and it appears from the 2015 fire

inspection, the room where the child was asleep is not approved for sleeping." According to appellant, evidence of non-compliance with daycare licensing requirements placed before the jury what was essentially "bad acts" evidence that is excluded under Rule 5-404(b).[4]

This issue was waived and is not properly before us. The Court of Appeals has consistently held that reversible error will not be found on appeal "when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (quoting *Grandison v. State*, 341 Md. 175, 218-19 (1995)); *accord DeLeon v. State*, 407 Md. 16, 31 (2008) (holding that defendant waived an objection to what he claimed was irrelevant and highly prejudicial testimony about his purported gang affiliation because evidence on the same point was admitted without objection elsewhere at trial); *Paige v. State*, 226 Md. App. 93, 124 (2015) (objection waived when similar evidence was admitted without objection).

The record before us shows that Ms. Modlin testified, without objection, that she prepared an inspection report relating to the April 15, 2016 events involving J.M., that

[4] Maryland Rule 5-404(b) provides:

> (b) **Other crimes, wrongs, or acts**. Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

appellant told her J.M. was asleep in a swing in an office bedroom not approved for sleeping, and that appellant's bedroom was not approved for sleeping. The information contained in Ms. Modlin's report was cumulative of her testimony at trial. Thus, even if the trial court erred in admitting the Office of Child Care report, the error was rendered harmless. *See Yates*, 429 Md. at 120 (holding that there is no reversible error when objectionable testimony is admitted if that testimony was already presented to the jury without objection).

III.

Appellant's final contention involves the trial court's decision to admit into evidence an e-mail she sent to Ms. Modlin on March 16, 2016, as well as two text message exchanges with an individual named Patrick Dobson which occurred approximately two weeks prior to April 15, 2016.[5] The March 16th e-mail to Ms. Modlin, which was admitted as State's Exhibit 59, provided, in relevant part:

> Hey Stacy,
> Sorry it took so long to get this done been dealing with some stuff and wasn't sure if I was gonna continue to do daycare anymore but things have started to get better kind of so we'll see how much longer I'll stay in this field. Anyway, enough of the rambling lol finally got passing results and it only had to be done once … Yessss!!!!! Any questions, let me know.
> Diandra

A text message exchange apparently from March 30, 2016, which Detective Quinn read in court, provided as follows:

[5] The March 16, 2016 text message from appellant to Ms. Modlin was admitted in evidence as State's Exhibit 59, and a copy of it is included in the record. The messages between appellant and Patrick Dobson were marked and admitted in evidence as State's Exhibits 60 and 61, but are not included in the record.

> The first one begins at 9:03 a.m., from a Patrick Dobson, I did not get a text from you. At 9:13 a.m., from Ms. Ward to Patrick Dobson, I have been busy and stressed out. I'm still -- I'm sorry, still busy. I'm trying to get things up and running by the weekend. I'm super exhausted, totally drained.
>
> On 9:14 a.m. a response from Patrick Dobson to Ms. Ward, oh, okay. At 9:14 a.m. a response from Patrick Dobson to Ms. Ward, have a good day. At 6:13 p.m. Ms. Ward messages Patrick Dobson, how was your day.

Detective Quinn also read the following text message exchange between appellant and Mr. Dobson from March 31, 2016:

> First beginning at 10:30 a.m. from Patrick Dobson to Ms. Ward, fine thanks you.
> At 10:30 a.m. from Ms. Ward to -- I'm sorry, yes, from Ms. Ward to Mr. Dobson, that's good, how's work?
> At 10:31 a.m. from Mr. Dobson to Ms. Ward, work is going fine thanks for asking.
> 10:32 a.m. from Ms. Ward to Mr. Dobson, you're welcome.
> 10:32 a.m. from Mr. Dobson to Ms. Ward, how is your day going.
> 10:32 a.m. Mr. Dobson to Ms. Ward, I guess you still having a busy day as usual.
> 10:42 a.m. from Mr. -- I'm sorry, from Ms. Ward to Mr. Dobson, not good.
> 12:14 p.m. from Mr. Dobson to Ms. Ward, what erong.
> At 12:14 p.m. Mr. Dobson corrects his spelling from E, erong, to what's wrong, W-R-O-N-G.
> At 12:34 p.m. from Ms. Ward to Mr. Dobson, everything . . . I'm stressed out about daycare. I wish I could quit.
> On 12 – I'm sorry, same date, 12:35 p.m. from Ms. Ward to Mr. Dobson, the kids aren't listening or following directions . . . I'm not getting paid . . . Kids aren't being picked up on time. I need a break away from here.
> 12:36 p.m. from Ms. Ward to Mr. Dobson, I'm tired of being alone, we barely talk, I feel like you are not interested anymore.
> 12:37 p.m. from Ms. Ward to Mr. Dobson, I don't have any pictures of you because they got deleted when my phone got replaced.
> 12:31 at 12:37 p.m. from Ms. Ward to Mr. Dobson, I miss you, I miss us.

(Transcript reformatted for clarity).

In ruling on the admissibility of these e-mails and text messages, the trial court stated,

> And the Court certainly acknowledges it's a balancing test between probative value and the prejudicial effect. Certainly there is some prejudice to what the -- to any testimony that comes in against the defendant, but the Court has to take a balancing effect of what this testimony is going to be, and as the Court hears it now, the testimony is information that this defendant was not happy with her job, that doesn't make her a bad person, that doesn't make it a crime, and that she was having frustration in dealing with the children. At least that's kind of a summarization. I am not giving the exact testimony because I really haven't heard that. I only know about proffers.
>
> But for right now the Court is going to allow, and after doing that balancing test, the Court is going to allow the testimony really because at this point it appears that this goes directly to state of mind, intent, and/or motive. That's not necessarily character. I mean certainly just because someone is unhappy with their job or not performing well doesn't necessarily mean that it is character evidence. And it is something that the Court -- or that the jury, who is the finder of fact, needs to look at in making that determination as to this defendant's either state of mind, intent, or motive, and certainly that circumstantial evidence, as the Court reviews the case law, may be used to show it.
>
> So in applying the balancing test, the Court is going to find that the probative value, at least at this time, outweighs the prejudicial effect. I'm going to allow the testimony[.]

Subsequently, the trial judge reaffirmed his decision to permit the evidence, stating:

> I believe that it is proper as it does address -- at least it's an issue for the jury to determine as to whether or not, you know, what the state of mind of the defendant was, or the intent, or the motive. I don't -- and when I apply the balancing test, I find that it is more probative than it is prejudicial. It's not really that prejudicial. It's she is frustrated with work. It's a fact -- it may be a fact that she is in fact frustrated with work, and it either directly or circumstantially goes to these other issues of intent, or motive, or state of mind.

Appellant argues that the trial court improperly admitted these exchanges as character evidence in violation of Rule 5-404(b). That Rule provides, in relevant part, that

> Evidence of other crimes, wrongs, or acts including delinquent acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other

> purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

To determine the admissibility of prior bad acts, a trial court must satisfy three separate requirements.

> The first required determination is whether the evidence fits within one or more of the stated exceptions to Rule 5-404(b). This is a legal determination that does not involve any exercise of discretion. The second requirement is that the trial court determine whether the defendant's involvement in the other act has been established by clear and convincing evidence. We review the trial court's decision to determine if there is sufficient evidence to support [its] finding. Lastly, the trial court must weigh the probative value of the evidence against any undue prejudice that may result from its admission. This determination involves the exercise of discretion by the trial court.

Sifrit v. State, 383 Md. 116, 133 (2004) (internal citations omitted).

Appellant argues that the trial court erred in admitting evidence of her e-mail and text message exchanges pursuant to the first and third requirements for 5-404(b) admissibility.[6]

A. The Evidence Fits Within One of the Stated Exceptions to Rule 5-404(b)

In challenging the admissibility of the e-mail and text messages, appellant claims that: 1) "state of mind" is not specifically mentioned in 5-404(b); 2) the e-mail and text messages do not directly prove motive or intent; and 3) "the trial judge did not engage in

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[6] Although we recognize that a statement may constitute a prior bad act, we express doubt that these communications, which involved statements primarily related to appellant's dissatisfaction with her daycare business, constitute "bad acts" for purposes of Rule 5-404(b). *See Klauenberg v. State*, 355 Md. 528, 547-48 (1999) ("[E]ven though solicitation of prostitution is a crime in this state, a defendant's statement that he 'got a girl and had sex,' without any indication that the girl was a prostitute or an unwilling partner, did not necessarily constitute a crime or bad act."). Nevertheless, we assume, like the trial court, that the communications at issue here constituted "prior bad acts" for purposes of Rule 5-404(b).

the required three-step analysis under *State v. Faulkner*, [314 Md. 630, 634-35 (1989)], before determining that the messages could be admitted." We address each of these arguments in turn.

In her brief, appellant argues "'state of mind' is not included within the wording of Rule 5-404(b), which limits the use of evidence of other crimes, wrongs, or acts." Although the words "state of mind" do not appear in the Rule, the stated exceptions listed in Rule 5-404(b) are not exhaustive. *Allen v. State*, 192 Md. App. 625, 652 (2010), *aff'd*, 423 Md. 208 (2011). Furthermore, the trial court used language that echoed the Rule when it found that the communications related to "what the state of mind of [appellant] was, or the intent, or the motive." The words "intent" and "motive" do appear in the Rule, and the State sought to introduce the e-mail and text messages to show appellant's mental state, which the rule expressly permits. *See Snyder v. State*, 361 Md. 580, 604 ("One of the purposes for which other crimes evidence may be admitted under Rule 5-404(b) is to prove motive. Motive is the catalyst that provides the reason for a person to engage in criminal activity."). Accordingly, we reject the notion that the court committed error because the words "state of mind" do not explicitly appear in the Rule.

Appellant next claims that "the messages indicating uncertainty about continuing with providing daycare and stress from operating a daycare business do not directly prove motive or intent." We disagree.

In *Jackson v. State*, this Court stated that

> Motive is a recognized exception to the general rule against admission of other crimes evidence. The Court of Appeals has defined motive as the catalyst that provides the reason for a person to engage in criminal activity.

> To be admissible as evidence of motive, however, the prior conduct must be committed within such time, or show such relationship to the main charge, as to make connection obvious, . . . that is to say they are so linked in point of time or circumstance as to show intent or motive.

230 Md. App. 450, 459 (2016) (internal citations and quotation marks omitted). Here, the messages revealed appellant's stress associated with her daycare business, her desire to quit, and that she "need[ed] a break." The connection between the communications and the crimes charged is obvious here—several weeks before J.M.'s injury at her daycare business, appellant voiced stress and frustration related to that very business. Her communications are relevant to motive or intent.

Finally on this point, appellant claims that the trial court erred by failing to engage in the three-step process required by *Faulkner*, 314 Md. at 634-35. The three-step process appellant refers to consists of determining: 1) whether the evidence fits within one of the stated exceptions to 5-404(b); 2) whether the involvement in the prior bad acts is established by clear and convincing evidence; and 3) whether the probative value of the bad acts evidence is outweighed by any undue prejudice. *Id.* Our review of the record indicates that the trial court engaged in this three-step process. First, as stated above, the trial court found the evidence relevant to appellant's "state of mind . . . or the intent, or the motive." Next, because appellant does not dispute the authenticity or accuracy of her own communications, there was no issue concerning the "clear and convincing" evidentiary standard. Third, the court clearly engaged in weighing the probative value of the communications against any undue prejudice when the court stated "I find that [the evidence] is more probative than it is prejudicial. It's not really that prejudicial. It's she is

frustrated with work." Clearly, the court engaged in the three-step process before admitting the communications.

B. Probative Value is not Outweighed by Undue Prejudice

Finally, appellant argues that the court erred in admitting the communications under the "probative value versus undue prejudice" determination. Specifically, she argues that the communications were "too remote to be probative" and "carried the potential to create unfair prejudice." We review a trial court's probative value/undue prejudice evidentiary determination for an abuse of discretion. *Darling v. State*, 232 Md. App. 430, 463 (2017); *Collins v. State*, 164 Md. App. 582, 609 (2005). "A court abuses its discretion where the ruling is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Jackson*, 230 Md. App. at 461 (internal quotation marks omitted) (quoting *Hebron Vol. Fire Dep't, Inc. v. Whitelock*, 166 Md. App. 619, 644 (2006)).

"Evidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission[.]" *King v. State*, 407 Md. 682, 704 (2009). Here, the evidence of appellant's frustration and stress with her job had no adverse effect beyond tending to prove her motive and mental state at the time of the crime. Because of the deferential standard we afford the trial court in this context, we perceive no abuse of discretion.

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