Circuit Court for Montgomery County
Case No. 131690C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2211

September Term, 2018

ROBERT EARL SIMMONS

v.

STATE OF MARYLAND

Nazarian,
Arthur
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: January 22, 2020

A jury in the Circuit Court for Montgomery County convicted Robert Earl Simmons of one count of sex abuse of a minor, three counts of third-degree sex offense, and two counts of incest. The victim was Mr. Simmons's biological daughter, A.S.,[1] who testified that Mr. Simmons engaged in sexual intercourse and other sexual activity with her from the time she was thirteen until just before she turned seventeen. Mr. Simmons's defense theory posited that A had accused him falsely because he was too strict and would not permit her to have contact with her mother, and that she wanted freedom from him.

On appeal, Mr. Simmons argues that the circuit court erred by not permitting him to cross-examine A about a report she made when she was ten years old to police in New Jersey about sexual abuse by her mother's boyfriend. As such, he contends, the court precluded him from impeaching A's testimony about why she did not report the abuse by Mr. Simmons earlier (she testified that she did not know how to do so and did not think she would be believed). He argues as well that the trial court erred by not conducting an on-the-record inquiry as to whether he knowingly and voluntarily waived his constitutional right to testify in his own defense, and in making that argument, he asks us to disregard Court of Appeals precedent. We affirm.

I. BACKGROUND

A testified that her mother has been out of her life since she was one or two years old because "she was on drugs" and "just couldn't take care of [A]." A lived instead with

[1] Like Mr. Simmons and the State, we will refer to the victim by first initial to protect her privacy.

her father and a series of his partners. When A was very young, she lived with her father, his girlfriend ("Ms. Ro"), and Ms. Ro's two teenage children. Then, for a period of roughly four years, she lived just with Ms. Ro and her children. When A was 13, her father brought her to live with him and his new girlfriend, Ms. Jacqueline, and Ms. Jacqueline's three older children. Several years later, around the age of 16, A moved in with her father and his wife, Josephine Balabala.

A testified that starting at around the age of 13, when they lived in Ms. Jacqueline's house, her father began touching her inappropriately on her breasts, and later also on her butt and vagina. She estimated that when she was thirteen, he touched her vagina "[m]aybe like 15 times" and "then more" when she was fourteen and fifteen. She estimated that between the ages of thirteen and fifteen, Mr. Simmons touched her on her vagina, her breasts, or her butt "[m]aybe like 20-30 times." During one summer while they lived in Ms. Jacqueline's house, when she was "about 15, 16," Mr. Simmons had vaginal intercourse with her for the first time.

The abuse continued when she moved in with Mr. Simmons and his wife, Ms. Balabala. Ms. Balabala worked weekends, and A testified that Mr. Simmons had vaginal intercourse with her "[e]very weekend while [Ms. Balabala] was at work." A also testified that Mr. Simmons performed oral sex on her "[m]aybe 10 times" when she was fourteen or fifteen and living at Ms. Jacqueline's house, and that he did the same when they lived at Ms. Balabala's house. The last time Mr. Simmons had intercourse with her was the Saturday before she disclosed the abuse.

Shortly before A turned seventeen, she told several of her friends that her father had been "doing inappropriate things" to her.[2] On Monday, March 20, 2017, her friends took her to see Diane Griffin, a teacher at her high school. A told Ms. Griffin that her father had been "sexually molesting" her, and Ms. Griffin then accompanied her to the office of the guidance counselor, Chanel Ramos Jones. A testified that she told Ms. Ramos "the same thing [she] told Ms. Griffin, he's been molesting me." Ms. Ramos reported the allegation to the school principal, who contacted Child Protective Services ("CPS"). CPS came to the school later that day and spoke to A, then placed her in foster care the next day.

A testified that before she told her friends about what happened, she was scared that she'd "have to go in foster care or nobody would believe me, that I would have to come back home to him." She also testified that her father told her that she "shouldn't tell anyone because of this snitch rule he had in his family" which meant that "if you snitch, that means that, basically, you're a bitch and it's not good to snitch on your family." A did not tell the detective or the nurse who later examined her at the hospital about this "rule."

A testified that she decided to tell someone about what had happened to her after

[2] One of A's friends, C, testified at trial. C explained that she, A, and another friend had approached a teacher, Ms. Griffin, about another friend who had been sexually assaulted. During that meeting, A asked Ms. Griffin "if what happen[s] if someone a family member is like using you," and Ms. Griffin responded that she should talk about it another time because she had to get back to her IEP class. Right after that conversation, A told C "that her dad, was, like, sexually abusing her and that he's really like obsessed with her and she showed me this message." C testified that "I didn't read it clearly, but [] I only saw that he was texting her constantly, constantly, constantly . . . ," and that she advised A to keep the messages and "talk to Ms. Griffin about it." C testified further that A was "really [] serious and sad" as she told her about it. Finally, C testified that she saw Ms. Griffin the next day, and Ms. Griffin informed her that she had talked to A, and that A had gone to the counselor.

learning that another student at her school had been sexually assaulted. She testified that learning that information "helped [her] to tell" because: "I saw that, like, she was, like, people believed her and she was big enough to tell, so, I was just, I told."

Ms. Griffin testified about the day that A came to talk to her, and recalled that A told her that "my dad is raping me on weekends." A reported to her that the last time he had done so was the previous weekend and that it had been happening since she was thirteen years old. When Ms. Griffin took A to see Ms. Ramos, Ms. Griffin heard A report "that her dad has been raping her." Ms. Griffin testified that, when A was talking about what had happened to her, A was shaky, sad, and "a little teary." Ms. Griffin testified that "it was a relief" for A to tell Ms. Ramos what had been happening.

Ms. Ramos also testified about the day that A reported the abuse. Ms. Ramos testified that Ms. Griffin and A entered her office and A told her she was "being raped" by her father since she was thirteen. Ms. Ramos asked when it last had happened, and A responded it had been the previous weekend. Ms. Ramos called CPS, which "came right away" and interviewed A. Ms. Ramos described how, when she first met A at around age sixteen, A was "kind of withdrawn, quiet and I would always have to pull information out of her." Ms. Ramos testified that, since A had reported what had happened, Ms. Ramos "see[s] her very often" and she further described how A "comes into [her] office says, good morning. She's playful. She is [] like a flower who blossomed."

On the same day, A went to a hospital, where a nurse performed a sexual assault exam. The nurse testified that A's demeanor was "flat, not very emotional, calm, just very

matter of fact." A told the nurse that she had been assaulted by her father the previous Saturday and that it had been going on for a long time. The nurse testified that, when she asked A to describe what happened, A responded as follows: "[H]e told me to come here and I did. He said, come here and take off your pants and lay down. Then he just did it. He finished in one of his shirts. This happens every weekend."

The results of the physical exam revealed no bruising or injuries on her body or to the vagina. There were several transections in A's hymen, which the nurse testified were "suggestive of long term abuse." On cross-examination, the nurse reviewed an article indicating that there was no consensus among experts that a partial transection of the hymen suggests abuse. The nurse acknowledged that, but maintained that, in her opinion, the findings she made "were consistent with the patient's statement of every weekend."

Detective Andrea Schendel and Laura Erstling (a CPS social worker) interviewed A together on March 20. Detective Schendel testified that A "had a very flat affect," "was very detailed [] during her interview of incidents," "did not smile much," was "not very animated," and "seemed very quiet." Detective Schendel testified that A "disclosed several instances of sex abuse by her biological father, Robert Simmons." A told Detective Schendel that "[s]he had been told not to tell but that no threats were made" and that A "never mentioned anything about being told there was a no snitch rule in the family." Detective Schendel called Mr. Simmons to inform him that CPS had custody of his daughter, and to ask him to come to the police office, which Mr. Simmons never did. Detective Schendel obtained an arrest warrant for Mr. Simmons and a search warrant for

his residence. When the search warrant was executed, the police seized two gray t-shirts—they had found at least 20 gray t-shirts, and had looked for them based on A's description. The two seized t-shirts were submitted for DNA testing, although the DNA results never came back. Mr. Simmons was subsequently arrested in North Carolina and extradited back to Maryland.

Dr. Evelyn Shukat, a pediatrician and medical director of the Tree House Child Advocacy Center, spoke to A for about an hour and a half on June 5, 2017. Dr. Shukat testified that she learned that A had disclosed prolonged sexual abuse, and that as she spoke with her, A "had a rather flat affect" and "gave responses in a monotone." Dr. Shukat also testified that A responded to her questions and "stayed on point." Dr. Shukat went on to explain generally about some of the characteristics and common behaviors that she sees in teenagers who experience prolonged sexual abuse:

> Children are afraid that if they disclose abuse and name their abuser, that there will [be] retribution from that abuser. Somehow, in their minds, they think the abuser will come back and abuse them even more for telling. One characteristic of children disclosing sexual abuse is, as a general rule, there's also an associated history of being threatened which also stops children and teens from talking about that. Even the act itself is a threat and they are afraid to disclose.

Dr. Shukat went on to explain other factors that may lead to a teenager not to disclose abuse, including the fear of being ostracized from the family, losing financial support, embarrassment, and fear of being punished:

> [THE STATE]: So, what are some factors then that influence a child to maintain secrecy in a case of, specifically, let's narrow it to intra-family sexual abuse.

> [DR. SHUKAT]: Well, the feeling of being ostracized from the family, the feel[ing] of losing any kind of familial support, you know, children and a teenager is a child, even if the abuser is in the family, that's a support person and there's a form of control that goes on from the abuser to the child which also retards the kid from talking about it. And there's embarrassment.
>
> [THE STATE:] Can you tell us, well, in effect, probably speaks for itself, when, what other sort of reasons do you commonly see for a long period of delayed disclosure in intra-family abuse, if anything.
>
> [DR. SHUKAT:] Oh, there's lots of other reasons, unfortunately. Many times, children feel that if they disclose, if it's a primary family member who is the abuser and they disclose that the abuser, what they've done, the loss of financial support in the family is inherent, so, they feel they may be homeless without food. They feel angst, [alienation] from other people in the family as well. They feel universally, I may say, that, well, there [are] exceptions, but I can say that over 80 percent of the time, children feel it's their fault even though, you know, intuitively, that doesn't make sense, but to a child they feel that the abuse is bad and that they've done something to have been punished that way.
>
> So, they don't want to disclose because if you are a child and you talk about something that you've done is bad what happens to you, they're punished more. So, again, the disclosure is delayed for years, at times, even into adulthood.
>
> [THE STATE:] And are there any other things, you said there were a lot, I just don't want to cut you off if there's other things.
>
> [DR. SHUKAT:] No, it, in general, children are afraid that they will get punished, that something worse will happen to them if they will talk about it. They are terribly ashamed. Many kids feel that if you look at them, you can tell that they have been abused just by looking at them. Their self-esteem is down and many of them are suicidal.

Ms. Balabala, Mr. Simmons's wife, testified that she met Mr. Simmons in 2011, that they married in 2015, and that Mr. Simmons and A moved in with Ms. Balabala and

her youngest daughter about a year later, in September 2016. She testified that A was twelve years old when they first met, and that at that time, A was very quiet and not talkative. Mr. Simmons usually slept in the basement, where the television and computer were. Between September 2016 and March 2017, Ms. Balabala worked night shifts every weekend.

On the morning of Monday, March 20, 2017, when Ms. Balabala returned from work, Mr. Simmons looked shaken and tired. When she asked him why he looked like that, he said he had had an argument with A. At about 10 a.m., Mr. Simmons received a call from CPS, he "started pacing in the room." He took Ms. Balabala to run some errands, but when they arrived at a shopping center, he told her he was going to the police station. Later that day, when they met up again, Mr. Simmons seemed worried. Later still, while they were at a grocery store, he received another call from the police and was "shaking" in the cab on the way home. When they arrived home, Ms. Balabala saw two police cars in the parking lot. Mr. Simmons instructed the cab driver to pass the police cars and move to the end of the parking lot. Ms. Balabala saw Mr. Simmons put his hood up. Mr. Simmons then told Ms. Balabala to go inside with her daughter and told the driver to "speed out." Mr. Simmons told her he was going back to the grocery store and would be back in ten minutes. But he never came back or called her, and the next time she saw him was about a month later, in April.

Ms. Balabala also testified that she and A had a good relationship and were close. She described occasions when Mr. Simmons and A argued about whether A could have

contact with her mother, and that if Mr. Simmons found out that A had contact with her mother, he and A would fight. Ms. Balabala disagreed with Mr. Simmons and believed that A should have contact with her mother.

A also testified about her attempts to keep in touch with her mother, and acknowledged that this was a "sore point" between herself and Mr. Simmons. She testified that she and Mr. Simmons fought over whether she could have contact with her mom, and that if he found out that she had talked to her mom, they would fight more. On cross-examination, A responded "Yes" when asked whether she told Dr. Shukat that she now feels like she has her freedom to be with her friends and contact her mother. On Sunday, March 19, the day after A told her friends about the abuse but the day before A told school authorities, she and Mr. Simmons had a "fight" after she told him that she had called her mother from Ms. Ro's house several weeks earlier. A acknowledged that she had said nothing about her father molesting her to Ms. Ro, to whom A "felt closest." A also did not tell Ms. Jacqueline or Ms. Balabala about the abuse. A also acknowledged that she reported to a teacher that a fellow student had made inappropriate comments to her, but that she did not report her father's abuse to the teacher.

At trial, Mr. Simmons sought to cast doubt on the credibility of A's report by arguing that A had both the opportunity and the ability to report the abuse earlier than she did. Mr. Simmons called into question A's choice not to tell Ms. Ro, Ms. Jacqueline, or Ms. Balabala about the abuse, despite their close relationships. He argued that A sought the same public attention received by the student at her school who had reported sexual

abuse about a week before A did.

Also, at two points during trial, Mr. Simmons sought to introduce evidence that seven years earlier, when A was ten years old, she had reported sexual abuse by her mother's boyfriend. The circuit court ruled on the admissibility of the testimony at two different points: *first*, when the State first raised its objection to the line of questioning prior to voir dire, and *second*, at the end of A's direct examination. We discuss the details of the parties' arguments and the court's reasoning more thoroughly below.

On March 1, 2018, the jury returned guilty verdicts, and the court sentenced Mr. Simmons to a total of forty-four years. Mr. Simmons appeals.

II. DISCUSSION

Mr. Simmons raises two issues on appeal.[3] *First*, he argues that the circuit court

[3] Mr. Simmons phrased the Questions Presented as follows:

> 1. Did the trial court err in refusing to allow defense counsel to cross-examine A. regarding a report that she made in 2010, and that was investigated by DSS, that she had been sexually abused by her mother's boyfriend?
>
> 2. Did the trial court err in failing to conduct an on-the-record inquiry of [Mr. Simmons] to ensure that [Mr. Simmons's] waiver of the right to testify was knowing and voluntary?

The State phrased the Questions Presented as follows:

> 1. Did the trial court properly exclude evidence that, seven years earlier, the victim had reported a separate episode of sexual abuse by someone else?
>
> 2. Under binding precedent, did the trial court correctly accept defense counsel's representation that Simmons would not testify, without itself advising Simmons of his right to testify?

erred in not allowing him to question A about a report of sexual abuse A had made when against her mother's boyfriend when she was ten years old because the evidence was relevant for impeachment purposes and not subject to Maryland's Rape Shield Statute. *Second*, Mr. Simmons argues that the circuit court erred in failing to conduct an on-the-record inquiry to ensure that his waiver of his right to testify was knowing and voluntary. We hold that the circuit court did not err in preventing Mr. Simmons from questioning A about the prior report and that the court was not required to conduct an on-the-record inquiry of Mr. Simmons.

A. The Circuit Court Did Not Err In Precluding Mr. Simmons From Cross-Examining A.S. About A Prior Complaint Of Sexual Abuse Made Seven Years Earlier Against Another Individual.

The briefs focus primarily on whether the trial court erred in deciding that the proffered evidence about A's report of sexual abuse by her mother's boyfriend was barred by the Rape Shield Statute, Maryland Code (2002, 2012 Repl. Vol.), § 3-319 of the Criminal Law Article ("CL").[4] The Rape Shield Statute bars evidence and opinion evidence

[4] The Rape Shield Statute generally bars evidence of the victim's chastity or lack of chastity. *Johnson v. State*, 332 Md. 456, 463 (1993). It was enacted "to prevent defense counsel from putting the victim 'on trial,' from unfairly invading the victim's privacy, and from deflecting the jury's attention from the true issue." *Id.* at 464 (cleaned up). In other words, the reasoning behind the law was to help prevent victims from deciding not to report a sexual crime out of fear that details of their personal lives would be discussed publicly in the courtroom. *Id.* The Statute provides, in relevant part:

> (a) Evidence relating to a victim's reputation for chastity or abstinence and opinion evidence relating to a victim's chastity or abstinence may not be admitted in a prosecution for:
>
> (1) a crime specified under this subtitle or a lesser included crime;

"relating to a victim's reputation for chastity or abstinence" in a prosecution for certain sexual abuse crimes. CL § 3-319(a). The statute allows such evidence under certain limited circumstances. Mr. Simmons argues that the Rape Shield statute does not apply to the proffered evidence at all, that A's report of sexual abuse by her mother's boyfriend does not constitute "prior sexual conduct" because *involuntary* sexual conduct is not covered. The State argues that the Rape Shield Statute applies to bar evidence of both *voluntary* and *involuntary* sexual conduct, and that the proffered evidence was properly excluded under

> (2) the sexual abuse of a minor under § 3-602 of this title or a lesser included crime; or
>
> (3) the sexual abuse of a vulnerable adult under § 3-604 of this title or a lesser included crime.
>
> (b) Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution described in subsection (a) of this section only if the judge finds that:
>
> (1) the evidence is relevant;
>
> (2) the evidence is material to a fact in issue in the case;
>
> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
>
> (4) the evidence:
>
> (i) is of the victim's past sexual conduct with the defendant;
>
> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
>
> (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or
>
> (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.
>
> ***

that law.

We hold that the circuit court did not err in deciding the proffered evidence was not relevant and that even if it was, the trial court did not abuse its discretion in excluding it.

1. Factual Background

This dispute arose for the first time before voir dire, during a discussion among the court and counsel concerning several evidentiary issues in advance of trial. The State argued that A's prior report was inadmissible under the Rape Shield Statute, that it was not relevant, and that it was prejudicial:

> [THE STATE:] So Your Honor, as we mentioned, there are a few evidentiary issues that we'd like to resolve before trial. [Defense counsel] has informed me that she has the intention of raising a few things that came up in both the school and Child Protective Services records the State will be opposed to her using. . . .
>
> So first is a report that the victim in the case, [A], made regarding other sexual abuse when she was approximately 10 years old, and that was investigated by Child Protective Services.
>
> Obviously, the State believes that falls under [CL § 3-319], and so we are very much opposed to any mention of those other sexual acts because they are not relevant, and prejudicial, and they fall under 3-319.

Mr. Simmons responded that the Rape Shield Statute did not bar the proffered evidence because its protections do not encompass involuntary sexual conduct such as sexual abuse and that the evidence was relevant to support his assertion that A "had the wherewithal to report abuse by someone she knew":

> [DEFENSE COUNSEL:] During [A's] CINA investigation, it was discovered that in 2010 which, granted, was seven years before this, [] she had been living with her mother in New

> Jersey, and there were allegations made that her mother's boyfriend had fondled her and touched her vagina.
>
> [T]here was an investigation through the New Jersey Child and Family Services involving this, and [A], at this time, was living in Maryland, in Howard County, with her father, so it was actually [] Howard County['s] Department of Social Service that did that investigation.
>
> And it only goes to the fact that she, I mean, not only that she was able to disclose – and this is kind of directly related to what [the State] was saying that [] it doesn't relate to reports of ongoing abuse by someone she knew. She certainly had the wherewithal to report abuse by someone she knew, and an investigation was started. And this happened many years before that.
>
> I'm not getting into what the results of the investigation were, but just that she had the wherewithal to make that report of allegations of a sexual nature involving someone she knew.

The court's reasoning, while not fleshed out in great depth, addressed both arguments the parties raised. First, the court decided that if the Rape Shield Statute does apply to prior involuntary sexual abuse, the proffered evidence would be barred because it did not fall into any of the statute's exceptions:

> THE COURT: So I guess my only issue with that is under 3-319, this kind of conduct is admissible under limited circumstances. So under (b), it has to be relevant, it has to be material to a fact at issue, the inflammatory or prejudicial nature of the evidence does not outweigh the probative value, and one of the following.
>
> One, is the victim's past sexual conduct with the defendant? No.
>
> Two, is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma. No.
>
> Or three, supports a claim the victim has an ulterior motive to accuse the defendant of the crime. No.
>
> Or four, is offered for impeachment after prosecutor's put the victim's prior sexual conduct at issue. No.

> So it doesn't seem to me like it fits, it clearly is conduct that's prior conduct, but it doesn't fit one of the very limited exceptions where the, where it would be admissible.

Defense counsel responded by arguing that the Rape Shield Statute does not encompass involuntary conduct that was the result of sexual abuse and that the testimony would be relevant for impeachment purposes if A were to testify that she didn't know to whom to report the abuse, or that she was afraid to report it because it "involved somebody she knew":

> [DEFENSE COUNSEL]: Well, Your Honor, but it's not really an instance of prior sexual conduct on the part of [A]. [A] was, at least by all reports in that, was not a willing participant, so she's not, we're not asking her about, like prior instances where she was involved with someone else and had sex. And I understand the exceptions to that.
>
> It doesn't even go to whether or not -- what it goes to is her willingness to disclose something involving somebody that she knew. And certainly, if [A] were to testify as to something that she didn't know who to report it to, she didn't know how to go about doing that, she, you know, was afraid to report it because it involved somebody she knew, I think it's certainly relevant for impeachment for that purpose.

The court responded by calling into question whether the prior conduct must be voluntary conduct to be barred under the Rape Shield Law, but it ultimately made a separate determination that the 2010 incident was not relevant:

> THE COURT: Well, I'm not sure that the prior conduct has to be voluntary conduct. I mean, you have prior conduct or contact all the time that's arisen -- I mean, I'm just not sure that's a requirement, that it has to be voluntary conduct.
>
> [DEFENSE COUNSEL:] Well, there is a case, Your Honor -- I'm just looking at the head notes that the legislative intent and purpose of this section indicates that sexual conduct must not only involve physical contact, but the physical contact must

> evidence the victim's willingness to engage in either vaginal intercourse or a sexual act.
>
> And so I don't think that, you know, we're not talking about, you know, her prior willingness to do anything. And it doesn't go, it's not an issue of whether or not she engaged in conduct; it's an issue of whether or not she had the wherewithal to report someone.
>
> THE COURT: Okay. I just, I think that the, I don't think that the proffered testimony fits within this exception. **It also seems like it's fairly remote in time -- 2010 versus the time of these allegations, which is, I guess, between 2014 and 2017.**
>
> **I mean, one of the significant things to me about the 2016 one is that it's occurring right in the middle of the time where these allegations occurred. So I don't think that the proffer fits the statute as it is, but I would also find that it's just too remote to be relevant to this case.**
>
> So I won't allow the testimony regarding the complaint of the New Jersey incident.

(emphasis added.)

The issue arose again during trial, shortly after A had testified about why she didn't tell anyone about the abuse. First, after testifying about how, at the time she was living with Ms. Jacqueline, Mr. Simmons would ask her to touch him "[u]ntil he ejaculated," she responded to a few questions about the reasons why she did not tell anyone about that:

> [THE STATE]: Okay, so, he pulled his pants down and then sat down?
>
> [A]: Yes.
>
> [THE STATE]: Okay, how far did he pull his pants down?
>
> [A]: To his knees.
>
> [THE STATE]: And then did you see his penis at that time?
>
> [A]: Yes.
>
> [THE STATE]: And what did he ask you to do?
>
> [A]: Make him masturbate.

[THE STATE]: So, he asked you to touch him.

[A]: Yes.

[THE STATE]: What did you do?

[A]: I did what he told me to.

[THE STATE]: And how long did that go on for?

[A]: Until he ejaculated.

[THE STATE]: Where did he ejaculate?

[A]: Also on his shirt.

[THE STATE]: And so, you've said a couple of times that he ejaculated on shirts, was there a specific type of shirt or kind of shirt that he used?

[A]: It was just a random shirt he picked up or he might have took it off of him.

[THE STATE]: Okay, something that was just laying around.

[A]: Yeah.

[THE STATE]: Okay and did you tell anybody about that?

[A]: No.

[THE STATE]: Why not?

[A]: Because **I didn't know how to tell anyone about it**.

[THE STATE]: What does that mean?

[A]: It means that like **I was scared to say something**.

[THE STATE]: Why?

[A]: **Because that's my father and I didn't know if anyone would actually, like, believe me**.

A short time later, she testified that she was scared that she wouldn't be believed and that if she told, she would have to go into foster care or back home to her dad:

[THE STATE]: So, [A], before you told your friends about this --

[A]: Yes.

[THE STATE]: -- **what where you scared about, if anything?**

> [A]: **That I'd have to go in foster care or nobody would believe me, that I would have to come back home to him**.
>
> [THE STATE]: Why were you scared going into foster care?
>
> [A]: Because I didn't know what to expect.
>
> [THE STATE]: **And you said you have to go back home to him.**
>
> [A]: **Yes.**
>
> [THE STATE]: **Why was that scary?**
>
> [A]: **Because if they didn't believe me.**
>
> [THE STATE]: So, then, you went and talked to your counselor. What's her name?
>
> [A]: Ms. Romas Jones.
>
> [THE STATE]: And what did you tell her?
>
> [A]: I told her the same thing I told Ms. Griffin, he's been molesting me.
>
> [THE STATE]: Okay, and when you made this report, what did you think was going to happen?
>
> [A]: I just thought that, that he was going to get in trouble.
>
> [THE STATE]: Okay and was that scary?
>
> [A]: Yes.
>
> [THE STATE]: Why?
>
> [A]: Because I didn't know if, how he would get into trouble.

(emphasis added.)

A short time later, defense counsel again raised the issue with the court. This time, neither the parties nor the court discussed the Rape Shield Statute, and the court did not change its earlier decision that the 2010 incident was not relevant:

> [DEFENSE COUNSEL]: Your Honor, there was a motion yesterday raised by [the State] regarding things I could and could not get into in asking questions of [A]. One of them was this prior report when she was younger about being touched by her mother's boyfriend. She has said repeatedly now, she

> didn't know what to do. She didn't know that anyone would believe her and she reported before and she was believed because an investigation -- []
>
> So, I think we're in a different posture now because she has made specific statements regarding not telling for a specific reason that I think there is evidence is, you know, she's told before she was believed and an investigation started.
>
> THE COURT: Okay, so she said, at least three different things. She said she didn't know how to tell. She said she was afraid of being sent back to her dad if she wasn't believed. She was afraid of going to foster care.
>
> [DEFENSE COUNSEL]: She also said she was afraid no one would believe her and then if no one believed her, she would go back to her dad.
>
> THE COURT: Okay, so, how does the reporting in 2010 bear on that?
>
> [DEFENSE COUNSEL]: Because she made a prior report of a similar type allegation involving her mother's boyfriend and she was believed --
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: -- the police did an investigation into that. It's my understanding, although I am not sure that that part's relevant, it affected her ability to go back with her mother.
>
> THE COURT: **Okay, so, when she started talking about not being believed, she said that she didn't think she'd be believed because this was her dad as opposed to a stranger because that kind of reporting is just, in her mind, inherently unbelievable that a dad would do this. So, I think, that's the context that she said that. So, I still because it's remote and it's a different scenario, I still don't think that's relevant . . . .**

(emphasis added.)

2. Analysis

Mr. Simmons argues that the circuit court erred in excluding testimony about the

2010 incident on the ground that it is barred by the Rape Shield Statute. The State maintains that the court excluded the evidence properly. But a close review of the transcript reveals that the primary basis for the court's decision to exclude was that the testimony was not relevant. We hold that the circuit court did not err in so deciding. And to the extent such testimony was relevant, the circuit court did not abuse its discretion in excluding it.

This question hinges on an interpretation of the Maryland Rules, a question of law that we review *de novo*. *Williams v. State*, 457 Md. 551, 563 (2018) ("When the circuit court determines whether a piece of evidence is relevant, that is a legal conclusion, which is reviewed without deference."). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401.

A court has no discretion to admit evidence that isn't relevant. *Williams v. State*, 232 Md. App. 342, 352 (2017), *aff'd* 457 Md. 551 (2018). But the court may exclude relevant evidence if the prejudicial effect of the evidence outweighs its probative value. Md. Rule 5-403. We review the trial court's decision to admit or exclude relevant evidence, *Williams*, 457 Md. at 563, and its management of the scope of cross-examination. *Simmons v. State*, 392 Md. 279, 296 (2006), *aff'd* 392 Md. 279 (2006), for abuse of discretion. An appellate court will not disturb a trial court's discretionary ruling where it "is reasonable, even if we believe it might have gone the other way." *Parker v. State*, 185 Md. App. 399, 427 (2009).

Mr. Simmons sought to question A about the 2010 incident in order to impeach her

testimony that she "didn't know how to tell [anyone]" about the abuse and that if she did tell, she was afraid that no one would believe her. He argues that in order to support his defense theory "that A. falsely accused [him] of sexually abusing her because he was too strict and controlling and would not permit her to have contact with her mother, and she wanted her freedom from him," he should have been permitted to show that she had the "wherewithal" to report abuse by someone close to her, and that as a result of her report, an investigation was conducted.[5] Mr. Simmons's position seems to be that A did have had the "wherewithal" to report her abuse based on her earlier experience. Essentially, although Mr. Simmons did not cite these Rules, his aim was to challenge her credibility under Rule 5-616(a)(1) and (3) through questions directed at proving that she made statements "inconsistent with [her] present testimony" or that "that an opinion [she] expressed [] is not held by [her] or is otherwise not worthy of belief."

We agree with the circuit court that A's experience in the 2010 incident was not relevant to impeach A's testimony that she feared she would not be believed and that she did not know how to report the abuse. As an initial matter, very little was proffered about the circumstances surrounding that incident and exactly what A's role in reporting the abuse was. All that Mr. Simmons proffered was that A had reported sexual abuse by her

[5] Mr. Simmons does not argue that his constitutional right to confrontation under the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights was violated. *See Martinez v. State*, 416 Md. 418, 428 (2010). Put another way, he does not argue that the trial court limited his ability to effectively challenge A's credibility and/or reach the "constitutionally required threshold level of inquiry" in his cross-examination of A. *Id.* at 429. This leaves us only to address Mr. Simmons's argument about relevancy under Rule 5-401.

mother's boyfriend, and that there was an investigation by Child Protective Services. The court found, though, that the 2010 incident was remote in time and was "a different scenario." The 2010 incident had occurred seven years earlier, when A was ten years old. It involved her mother's boyfriend, a non-relative, rather than her own father. The court inferred from A's testimony that A didn't think she'd be believed because "this was her dad as opposed to a stranger" and "because that kind of reporting is just, in her mind, inherently unbelievable that a dad would do this." The court did not err in finding too attenuated and out of bounds the inference Mr. Simmons sought to draw, and we see no error in its decision to preclude Mr. Simmons from questioning A about the 2010 incident.

But even if the 2010 incident were marginally relevant to A's testimony, the court did not abuse its discretion in excluding it, for the same reasons: that incident was too remote in time, involved different individuals, and involved different circumstances. The court readily could have concluded that the dangers of unfair prejudice, confusion of the issues, and the likelihood of misleading the jury all would substantially outweigh whatever limited relevance that questioning could have. Md. Rule 5-403. It easily could be true that A had some knowledge about the reporting process from a prior report *and* that she was scared "[t]hat [she]'d have to go in foster care or nobody would believe [her], that [she] would have to come back home to [her father]."

Mr. Simmons argues—without citation—that the court's decision to exclude the testimony cannot be understood as a discretionary ruling under Rule 5-403 because the court failed to "balance the probative value of the evidence against the dangers of unfair

prejudice, confusion of the issues, or misleading the jury" explicitly. But although the record must support that the trial court "sufficiently demonstrate[ed] that it assessed the relative weights of probative value and prejudicial danger," *Beales v. State*, 329 Md. 263, 274 (1993), "trial judges are not obliged to spell out in words every thought and step of logic." *Id.* at 273; *Medley v. State*, 386 Md. 3, 7 (2005) (observing that, "absent a misstatement of law or conduct inconsistent with the law, a trial judge is presumed to know the law and apply it properly" (cleaned up)); *State v. Chaney*, 375 Md. 168, 183–84 (2003) (observing that the burden to negate the presumption that the trial court knew and properly applied the law lies with the appellant). In this case, the fact that the trial court did not articulate its weighing of probative value and prejudicial effect explicitly "is in no way controlling." *Dickens v. State*, 175 Md. App. 231, 241 (2007). Mr. Simmons has not offered any substantive basis on which we could find that the circuit court misapplied the law or otherwise abused his discretion in excluding evidence of the 2010 incident, and has not rebutted the presumption that the trial court knew the law and applied it correctly.

B. The Court Was Not Required To Conduct An On-The-Record Inquiry of Mr. Simmons's Waiver Of His Right To Testify.

Mr. Simmons argues next that the circuit court erred in failing to conduct an on-the-record inquiry to ensure that his waiver of the right to testify was knowing and voluntary. The State responds that "controlling precedent in Maryland forecloses that argument." We agree.

1. Factual Background

The circuit court gave Mr. Simmons and his trial counsel an opportunity over a

lunch recess to make a decision regarding Mr. Simmons's waiver of his right to testify:

> [DEFENSE COUNSEL:] I have talked with my client and when he left it this morning and [sic] he was not going to testify. I don't know where we are at this point.
>
> THE COURT: Okay. So I'm going to let the jury go for like an hour and 15 minutes so we can discuss jury instructions and then you all can get some lunch.
>
> * * *
>
> THE COURT: Okay [Instruction] 3.17 [on] election of defendant [whether to testify]. I'll wait until after lunch?
>
> [DEFENSE COUNSEL:] Yes.
>
> * * *
>
> THE COURT: Okay. We're back on the record. The defendant is present in court. Okay, What are we up to this afternoon?
>
> [DEFENSE COUNSEL:] Your Honor, the State rested. I made my motion for judgment of acquittal and it is my understanding that Mr. Simmons has decided not to testify.
>
> THE COURT: Okay.

2. Analysis

In Maryland, a trial court generally is not obligated to advise the defendant on the record of the right to testify. As we explained in *Savoy v. State*, criminal defendants do have a constitutional right to testify in their own defense. 218 Md. App. 130, 148 (2014) (*citing Rock v. Arkansas*, 483 U.S.44 (1987)). That right may be waived when the waiver is knowing and voluntary, but "when a defendant is represented by counsel, there is no obligation on the part of the court to advise the defendant of the right to testify." *Id.* (*citing Stevens v. State*, 232 Md. 33, 39 (1963); *Tilghman v. State*, 117 Md. App. 542, 554 (1997)). And "even though the right to testify is personal to the defendant, and must be waived by the defendant personally, the trial court may assume that counsel has advised the defendant

about that right and the correlative right to remain silent and, if the defendant does not testify, that the defendant has effectively waived the right to do so." *Id.* at 148–49 (*citing Tilghman*, 117 Md. App. at 555). Under certain limited circumstances, a court does have a duty to act. *Thanos v. State*, 330 Md. 77, 91 (1993) (observing that "trial judges have no affirmative duty to inform represented defendants of their right to testify except 'where it becomes clear to the trial court that the defendant does not understand the significance of his election not to testify or the inferences to be drawn therefrom. . . .'") (*quoting Gilliam v. State*, 320 Md. 637, 652-53 (1990)). But Mr. Simmons does not argue that his situation falls within any of these exceptional circumstances.

Mr. Simmons argues instead that we should decline to follow these principles on the ground that the *Stevens* case (in which the Court of Appeals held that where the accused has counsel, it should be presumed that he has been informed of his rights, 232 Md. at 39) "is fifty-five years old" and inconsistent with subsequent United States Supreme Court precedent and Maryland case law concerning heightened procedural requirements to secure knowing and voluntary waivers of other trial rights. But "[u]nless a case can be distinguished on its facts, this Court does not have the option of disregarding Court of Appeals decisions that have not been overruled, no matter how old the precedent might be." *Johns Hopkins Hosp. v. Correia*, 174 Md. App. 359, 382 (2007), *aff'd* 405 Md. 509 (2008). Mr. Simmons offers no reason why—and indeed does not argue that—this case falls within one of the exceptions to the general rule that the court has no obligation to conduct an on-the-record inquiry to ensure that his right to testify was knowing and

voluntary, and we are not free to disregard controlling precedent. To the extent he seeks to preserve the opportunity to ask the Court of Appeals to revisit *Stevens*, he is free to do so now.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.