Circuit Court for Montgomery County
Case No.: 129880

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2341

September Term, 2017

DION MATTHEWS

v.

STATE OF MARYLAND

Fader, C.J.,
Kehoe,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: May 29, 2019

In 2016, Dion Matthews, the Appellant herein, lived in a three-level townhome with his significant other, their four daughters, including K.,[1] then ten-years old, and a younger son. K. shared a bedroom on the third floor with one of her sisters, and her parents' room was on the second floor. The following facts were elicited at trial.

On the morning of June 2, 2016, after K.'s mother and siblings had left the family's townhome for the day, Matthews carried K. from her bed, while she was "half asleep," and placed her on his bed. Matthews then "laid on top" of K., his penis touched her vagina, and he moved her "up and down" by placing his hands on her buttocks. Matthews stopped moving K. "up and down" when he checked the time on his phone and got up to use the bathroom. K. then proceeded to get ready for school and left, testifying that she wore the same t-shirt and underwear that she was wearing when Matthews had laid on top of her.[2]

Later that morning, at school, K.'s teacher, Ms. Stephenson, in the presence of K., called K.'s mother to inform her of some concerns she had regarding K. Following the phone conversation, K. informed Ms. Stephenson that her father had been "doing nasty

[1] To protect the identity of the victim, a minor, we shall refer to her by her first initial.

[2] At trial, K. testified that, in the past, Matthews' penis had touched her vagina on more than one occasion, and that it had been happening since she was nine-years old. She testified that sometimes it happened in her bedroom, and when it did, Matthews would sit on a chair and place K. on his lap and "move his legs back and forth." K. informed the court that aside from telling her teacher, Ms. Stephenson, about Matthews' actions, she also told her mother, but that she did not remember what her mother's response was. K. stated that even after she informed her mother of what Matthews had done to her, he continued doing "nasty stuff" to her.

stuff" to her and had done so earlier that morning. After being called by K.'s school, Ayana White, a social worker from Montgomery County Child Welfare Services, picked K. up from school, brought her to the police station for interviewing and called K.'s mother asking her to come down to the police station. At the direction of the police, after a detective and Ms. White had interviewed K., K.'s mother and K.'s two older sisters, K.'s mother took K. to Shady Grove Hospital for a physical examination.

At Shady Grove Hospital, Sandra Carlin, a registered nurse in the hospital's critical care observation unit who is also a trained "forensic nurse examiner in the sexual assault department,"[3] performed a physical examination of K. At trial, Ms. Carlin testified that, at the time of the physical examination, K. informed her that after being assaulted by Matthews that morning, her underwear was wet, and she changed into a new pair before going to school. Ms. Carlin also testified that K. told her that, earlier that morning, Matthews had taken his underwear off and penetrated her rectum with his penis. The nurse then collected swab samples from K.'s thighs, external genitalia, lips, buttocks, perianal area, abdomen and both sides of her neck, for rape kit submission. Police officers also collected a pair of K.'s pajamas from her home, which was also submitted for serological and DNA testing.

[3] At trial, Ms. Carlin explained that her "regular job" is as a nurse in the hospital's observation unit, working three 12-hour shifts a week, where she monitors patients with cardiac issues. In addition to her "regular job," she also works, "on call," as a "forensic nurse examiner." Ms. Carlin explained that a "forensic nurse examiner" is a "nurse who's specially trained by the State of Maryland to do specialized examinations on . . . patients who have been sexually abused, child abuse, elder maltreatment, domestic violence and human trafficking."

Erica Wolanin, a forensic biology analyst at Bode Cellmark Forensics,[4] conducted serological testing on the swabs collected by Ms. Carlin and the pajamas seized from K.'s home. Catherine Roller, a DNA analyst at Bode Cellmark Forensics, conducted the DNA analysis on the same evidentiary items.

At trial, Ms. Wolanin testified that she had examined one of the swab samples from K.'s neck and confirmed the presence of two sperm heads but noted that the same sample could not be tested for seminal fluid. Ms. Wolanin also conducted a search for sperm in samples from the underwear K. was wearing when examined at Shady Grove. While examining a sample from the exterior of the underwear crotch panel, Ms. Wolanin found one sperm head, but testing for the presence of seminal fluid was negative, and DNA testing on the sperm head yielded no reportable results. Ms. Wolanin further conducted a sperm search of a sample from the interior crotch panel of the underwear. She did not find any sperm, and the sample tested negative for seminal fluid. DNA testing on the sperm fraction of the sample, however, yielded a partial Y-STR profile.[5] Neither Matthews nor any of his male biological relatives could be excluded as a possible source of that DNA profile. Ms. Wolanin also found one sperm on another sample from the interior crotch panel of K.'s underwear.

[4] Bode Cellmark Forensics is a private laboratory that is contracted by the Montgomery County Police Department to conduct forensic DNA and serological testing.

[5] At trial, Ms. Roller testified that a Y-STR profile provides the lineage of a DNA sample, stating that "any biological male relative would have the same YSTR profile barring any mutations" as the one found on K.'s underwear.

After testing a sample from the interior of K.'s pajamas, which had been collected from the home, Ms. Roller testified that the DNA profile collected "was consistent with a mixture of at least two individuals, including at least one male contributor."

After a five-day trial, a jury sitting in the Circuit Court for Montgomery County found Matthews guilty of one count of sexual abuse and four counts of sexual offense in the third degree.

Thereafter, Matthews filed a motion for a new trial, pursuant to Rule 4-331, based on defense counsel having learned about a statement purportedly written and signed by K. that appeared to contradict her trial testimony; the letter stated:

> Dear Mommy can I just say I'm sorry and please don't get mad but I lied. I only told Mrs. Stephenson that because I knew I was in trouble and I wanted somebody else to get in trouble so the focus would be on them so you wouldn't remember that I was in trouble but I failed to realise that not only did I lie but I did it to get somebody in trouble and I am soooooooo so sorry and I know that when I give this to you you'll probably not want to look at me again. I know what ur thinking why did I tell you he was doing this those other times well I don't even [k]now and I'm sorry.

The trial court held a hearing on the motion for a new trial.

At the new trial hearing, K. testified that she wrote the letter to her mother and explained that the "lie" referenced in the letter was what she told Ms. Stephenson her father had done to her on the morning of June 2, 2016. K., however, informed the court that the letter itself was a lie and that the allegations against Matthews were true. While she could not recall the exact day on which she penned the letter, she believed that she did so before trial. K. stated that she wrote the letter on her own and gave it to her older sister to deliver to their mother. K. also testified that she had told no one else about the

letter's existence. K. stated that she wrote the letter to "make things better" so that Matthews could come back home.

Ms. Deborah Buchmon,[6] K.'s paternal grandmother, testified that, before the trial, she had a conversation with K. in which K. admitted that the accusations she had made against Matthews were untrue. Ms. Buchmon also testified that she informed K.'s mother and Matthews' lawyer about the conversation she had with K. While Ms. Buchmon stated that she wanted to testify at trial, defense counsel never called her.

Ms. Heidi Miranda, a social worker for the Montgomery County Department of Health and Human Services, Child Welfare Division, also testified to a conversation she had with K. following the disclosure of the letter. Ms. Miranda interviewed K. as a follow up to a child neglect investigation the Department had launched against K.'s mother.[7] During the interview, Ms. Miranda asked K. about the letter to which K. indicated was a lie. K. told Ms. Miranda that she wanted her father to come home from prison and that she had told her mother that the accusations made against Matthews were untrue.

Judge Robert Greenberg of the Circuit Court for Montgomery County ultimately denied Matthews' motion for a new trial. At sentencing, he merged the four counts of sexual offense in the third degree into count one, sexual abuse of a minor, and sentenced

[6] Although the State spells Ms. Buchmon's name as "Buchman," we adopt the spelling provided in the record and used by Matthews, which is "Buchmon."

[7] On March 8, 2018, K.'s mother, pleaded guilty to neglect of K. and received five years' probation.

Matthews to twenty-five years' imprisonment, with all but twenty years suspended and three years' probation. Matthews then filed a timely Notice of Appeal.

On appeal, in asking this Court to reverse the judgment of the Circuit Court, Matthews presents the following questions for our review:

> 1. Did the trial court erroneously deny Mr. Matthews' motion for a new trial?
>
> 2. Did the trial court abuse its discretion when it denied Mr. Matthews' motion *in limine* to exclude testimony by the State's DNA and serology experts?
>
> 3. Did the trial court erroneously admit K.'s hearsay statement to nurse Sandra Carlin that was made during a forensic medical examination, where K. admitted that she did not know the purpose of the examination?

We respond in the negative to the questions raised by Matthews and shall affirm the judgment of the Circuit Court.

DISCUSSION

A motion for a new trial is governed by Rule 4-331, which provides:

> **(a) Within Ten Days of Verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
> **(b) Revisory Power.**
> (1) *Generally*. The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
> (A) in the District Court, on motion filed within 90 after its imposition of sentence if an appeal has not been perfected;
> (B) in the circuit courts, on motion filed within 90 days after its imposition of sentence. Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.
> (2) *Acts of Prostitution While Under Duress*. On motion filed pursuant to Code, Criminal Procedure Article, § 8-302, the court has revisory power and control over a judgment of conviction of prostitution to vacate the judgment, modify the sentence, or grant a new trial.

> **(c) Newly Discovered Evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief; and
> (2) on motion filed at any time if the motion is based on DNA identification testing not subject to the procedures of Code, Criminal Procedure Article, § 8-201 or other generally accepted scientific techniques the results of which, if proved, would show that the defendant is innocent of the crime of which the defendant was convicted.
> **(d) DNA Evidence.** If the defendant seeks a new trial or other appropriate relief under Code, Criminal Procedure Article, § 8-201, the defendant shall proceed in accordance with Rules 4-701 through 4-711. On motion by the State, the court may suspend proceedings on a motion for new trial or other relief under this Rule until the defendant has exhausted the remedies provided by Rules 4-701 through 4-711.
> **(e) Form of Motion.** A motion filed under this Rule shall (1) be in writing, (2) state in detail the grounds upon which it is based, (3) if filed under section (c) of this Rule, describe the newly discovered evidence, and (4) contain or be accompanied by a request for hearing if a hearing is sought.
> **(f) Disposition.** The court may hold a hearing on any motion filed under this Rule. Subject to section (d) of this Rule, the court shall hold a hearing on a motion filed under section (c) if a hearing was requested and the court finds that: (1) the motion was filed pursuant to subsection (c)(1) of this Rule, it was timely filed, (2) the motion satisfies the requirements of section (e) of this Rule, and (3) the movant has established a prima facie basis for granting a new trial. The court may revise a judgment or set aside a verdict prior to entry of a judgment only on the record in open court. The court shall state its reasons for setting aside a judgment or verdict and granting a new trial.

Matthews alleges that he is entitled to a new trial under subsection (a) because his motion for a new trial was filed within ten (10) days after the verdict. In moving for a new trial pursuant to subsection (a), as grounds for his motion, Matthews proffers that the letter written and signed by K. served as newly discovered evidence that could not have been found before trial and would have had a material effect on the outcome of the trial,

because the jury was entitled to know that K. had "recanted" her allegations against him. Matthews contends that the "interest of justice" compels a new trial, because the letter could have been admitted into evidence and would have served as more persuasive impeachment of K.'s credibility than the impeachment testimony adduced at trial. He argues that, because of the pivotal nature of K.'s testimony, the trial judge abused his discretion in denying his motion for a new trial, as the jury was unable to consider the letter when hearing the case.

The State alternatively contends that the trial court properly exercised its discretion in denying the motion given the suspicious circumstances pertaining to the letter's creation, discovery and disclosure. The State also posits that, with respect to K.'s credibility, any evidentiary value proffered by the letter would have been cumulative of all the other impeachment of K. adduced during the trial, and as such, cannot provide the basis for a new trial.

During the hearing on the motion for a new trial, Judge Greenberg expressed reservation about whether the letter was "newly discovered" as a threshold but, nonetheless, reached the merits of the motion, opining that he had "great doubts about the creation and circulation" of the letter "none of which are ascribed to defense counsel." Although we share the skepticism about whether the letter met the standard of "newly discovered" because of its having been penned before trial, as expressed by the Judge, we will review his decision to deny the motion for a new trial on the merits.

On appeal, the denial of a motion for a new trial is subject to reversal when there is an abuse of discretion. *Campbell v. State*, 373 Md. 637, 665 (2003) (citing *Mack v.*

State, 300 Md. 583, 600 (1984)). Abuse of discretion is the appropriate standard of review because the "decision to grant or deny a motion for a new trial under Rule 4-331(a) 'depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record[.]" *Williams v. State*, 462 Md. 335, 344–45 (2019) (citation omitted); *see also Merritt v. State*, 367 Md. 17, 30 (2001); *Argyrou v. State*, 349 Md. 587, 600 (1998). Although the discretion afforded to the trial judge is "broad," it is "not boundless." *Campbell*, 373 Md. at 665 (quoting *Nelson v. State*, 315 Md. 62, 70 (1989)). The abuse of discretion standard requires that a trial judge apply his or her discretion soundly. *Campbell*, 373 Md. at 665–66. Abuse occurs "when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Id.* at 666 (citing *Ricks v. State*, 312 Md. 11, 31 (1988)).

Judge Greenberg provided the following bases for denying the motion for a new trial, which we review for clear error:

- His evaluation of K.'s testimony wherein she stated that she wrote the letter "to make things better";
- The use of words and phrases such as "focus" and "I failed to realize," both of which are not commonly used by ten-year old children;
- The fact that K. wrote a letter to her mother instead of just telling her;
- The timing and circumstances surrounding the discovery of the letter appeared odd;
- The fact that K.'s sister did not deliver the letter to her mother immediately;
- The fact that K. signed her full name at the bottom of a letter addressed to her mother, like it was "some sort of legal document";

- The fact that the letter refers to other times that K. "apparently told her mother about acts of abuse by her father and the mother apparently did nothing to protect her child," thereby, buttressing K.'s claims that the abuse was of longer duration than just this one incident;

- Finding that K. did not write the letter alone because, in part, she shared a room with an older sister;

- At trial, family members had testified that K. was a liar;

- The letter was not a recantation of K.'s sworn trial testimony as it "was written before K. testified [and] you [cannot] recant testimony that hasn't yet been given"; and,

- K.'s trial testimony wherein she stated that Matthews had, in fact, sexually abused her.

Based on our review of the evidence, we credit the findings of the trial judge and conclude that he did not err.

Judge Greenberg determined, thereafter, that the "interest of justice" did not require a new trial, because the letter was cumulative of all of the other impeachment of K. adduced at trial.

> In conclusion, I find that the letter was written before trial but not solely at the instance of [K.]. That is was cumulative of similar evidence heard by the jury and that its admission as impeachment evidence would not create a significant or substantial possibility that the jury's verdict would have been affected.

Matthews, of course, disagrees with Judge Greenberg, positing that, because the letter was in writing and signed, it should not have been deemed to be cumulative as to impeachment. He does so, without citation of authority, for the proposition that the

writing signed by K., admissible under Rule 5-802.1(a)(2),[8] would have been more probative impeachment of K.

The letter, which for purpose of argument may have been admissible under Rule 5-802.1(a)(2),[9] was proffered as further impeachment of K. by Matthews, not substantive evidence of his innocence. Generally, it is axiomatic that the prior inconsistent statement of a witness may be introduced to prove the truth of the matter asserted therein only if the statement falls within a hearsay exception, Rule 5-802, or if the witness testifies at trial and adopts the statement, Rule 5-802.1(e). Once admitted, its proponent has to make a

[8] Rule 5-802.1(a)(2), in pertinent part, provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was . . . (2) reduced to writing and was signed by the declarant[.]

The Rule practically embodies the holding in *Nance v. State*, 331 Md. 549 (1993), which provided that a State witness's out-of-court statement was admissible as substantive evidence, provided that the out-of-court statement was inconsistent with the witness's in-court testimony, the prior statement was based on the declarant's own knowledge, was reduced to writing and signed and the witness was subject to cross-examination at the trial where the out-of-court statement was introduced. *Id.* at 569. In *Nance*, the Court of Appeals also held that a witness's prior inconsistent testimony before a grand jury is admissible at trial, as long as the witness was available at trial for cross-examination. *Id.* at 571.

[9] K.s' letter, however, may not have been admissible under Rule 5-613(b), because, at the hearing on the motion for a new trial, K. admitted having penned the letter. Under Rule 5-613(b), "extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter." For sake of argument, nevertheless, we rely on the notion that the letter could have been admitted under Rule 802.1(a)(2).

choice, to rely on the prior inconsistent statement as impeachment or as substantive evidence. As one of our State's noted authorities on evidence, Lynn McLain, has noted:

> If a particular [inconsistent] statement falls under an exception to the hearsay rule, then its proponent may choose (1) whether to offer it solely for impeachment and thus to discredit the witness's trial testimony, or (2) whether to offer it as substantive evidence, because the prior statement, if true, will help prove the proponent's case.

6 LYNN MCLAIN, MARYLAND EVIDENCE – STATE AND FEDERAL § 613:1 at 766 (3d ed. 2013) (citations omitted).

In the present case, Matthews made the strategic decision to proffer, at the new trial hearing and before us, K.'s letter as impeachment, ostensibly as he argued, because he believed the writing would be more probative that K. lied than the testimony of K.'s mother and sister adduced at trial and his cross-examination of K., although again without any citation of authority. Relative probity of impeachment statements, however, is not delineated in the Rules. Rule 5-613(a), the Section that governs the examination of a witness concerning a prior statement, in fact provides that a "prior written or oral statement made by a witness" may be used in impeachment, without any delineation of their relative probity. As a result, Matthews' argument that the letter should have been accorded more weight for impeachment purposes fails.

Matthews also argues that Judge Greenberg, in assessing the materiality of K.'s letter, erroneously concluded that it served only as "merely impeaching," rather than impeaching, thereby implicating whether it addressed issues central to the case or not. At the hearing on the motion for a new trial, Judge Greenberg stated:

Assuming that the evidence was newly discovered within the rule as I mentioned earlier it must also be material and not merely cumulative or impeaching and in that regard I want to read a passage from Jackson [v. State] which I think is key to this case. It's on page 698 to 699 of the Court of Special Appeals opinion at 164 Md. App. 679. So, the cousin was Shikara Jackson and Shikara Jackson said that the day after the testimony her cousin the victim told her that she had been pressured into giving the testimony.

So, what Judge [Moylan] wrote was in terms of characterizing Shikara Jackson's testimony putting it in a hypothetical context may help. If the victim's conversation with Shikara Jackson had with appropriate changes of tense taken place the day before her trial testimony rather than the day after and had been offered in rebuttal by the Defense through Shikara Jackson, what would have been its evidentiary fate. Not qualifying under any exception to the rule against hearsay it could not have been received as substance of evidence on the merits of the appellant's guilt or innocence.

It could only have been received if at all as a prior inconsistent statement for the limited purpose of impeaching the victim's testimonial credibility. That makes its significance peripheral to wit merely impeaching. Evidence that is merely impeaching does not reach critical mass at least in terms of permitting an appellate court to hold the trial judge abused his discretion in denying a new trial motion resting on such a predicate. [K.'s] credibility in this case was called into question numerous times by evidence produced by the defendant at the time of trial. This included her family members calling her a liar and an admission by [K.] that she had previously stated exactly what is in the letter.

In other words, the letter was at best cumulative of testimony the jury had already heard. The jury in this case had before all this information as well as forensic information suggesting the defendant did indeed commit these acts and those findings of evidence including the presence of sperm on [K.'s] neck and in her underwear. The jury may well have concluded as I did that [K.] was subjected to enormous pressure from her family after the allegation surfaced which might cause her to walk back her allegations after her father's arrest. It may well have concluded as I did that while children might make up a story to get themselves out of trouble this was an allegation that has been made before and is in the Court's view it would be unusual for a child of 10 to accuse a father of whom she obviously loves greatly of unspeakable crimes just to divert attention from being disciplined.

Judge Greenberg, however, did not determine that K's letter was "merely impeaching," which would have been identifying it as collateral rather than relating to the merits of the case, as impeaching. *See Campbell*, 373 Md. at 670; *Love v. State*, 95 Md. App. 420, 433 (1993). Rather, Judge Greenberg specifically treated the letter as among the evidence adduced that went to the heart of the matter, albeit that it was unnecessary as cumulative.

In so opining, Judge Greenberg was correct, in our view, in noting that the letter was "at best" cumulative of other impeachment of K. adduced by Matthews, in accord with Rule 5-403, which permits a judge to exclude evidence if the judge finds that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See Merzbacher v. State*, 346 Md. 391, 414–15 (1997) ("A trial judge always acts within his or her discretion by prohibiting the introduction of relevant but otherwise cumulative evidence." (citing Rule 5-403)). Cumulative, in this regard, is "evidence that is substantially the same" as other evidence already introduced. *In re Adoption/Guardianship No. 95195062/CAD in Circuit Court for Baltimore City*, 116 Md. App. 443, 465 (1997) (citation omitted); *see also Cumulative*, Black's Law Dictionary (10th ed. 2014) ("tending to prove the same thing"); *Cumulative Evidence*, Black's Law Dictionary (10th ed. 2014) ("Additional evidence that supports a fact established by the existing evidence (esp. that which does not need further support)."). Judge Greenberg's determination, thus, relied on the fact that the letter was cumulative of other impeachment offered by Matthews; in this, he did not err.

In conclusion then, Judge Greenberg acted within his discretion in denying Matthews' motion for a new trial.

Matthews next argues that Judge Greenberg abused his discretion in denying Matthews' motion *in limine* related to the DNA and serology evidence. Before trial, Matthews filed a motion *in limine* seeking to "preclude the introduction of trace serology[10] and DNA evidence" and to "preclude the State from arguing that the trace serology and DNA evidence establishe[d] that sexual activity occurred."[11] Specifically, Matthews argued that the DNA and serological evidence, as provided by the testimony of the State's experts, was not relevant because it was inconclusive in terms of connecting Matthews to the sperm heads found on K. and also because the sperm heads could have been transferred "innocently" through the laundry. After hearing arguments on the motion, Judge Greenberg denied it, ruling that the DNA and serological test results[12]

[10] Ms. Wolanin, the State's serology expert, explained that serology involves the study of bodily fluids, which includes blood, semen, saliva and apparent human hairs. Ms. Wolanin stated that, in her job, she screens items of evidence for the presence of these fluids and prepares reports reflecting her findings.

[11] Matthews, on appeal, cannot complain that the trial court erred in permitting the State to ask its experts whether the sperm heads could have been transferred through sexual contact on redirect because, as Judge Greenberg noted, the State was permitted on redirect to question Matthews' introduction of innocent transfer via laundry on cross-examination. As Judge Greenberg noted, the question of how the sperm was transferred was one of weight not admissibility, especially because K. had testified that Matthews wiped something on her neck after being assaulted, and the test results demonstrated that sperm heads had been on her neck. *See Trimble v. State*, 300 Md. 387 (1984).

[12] The samples from K. included "external genitalia swabs, anal slash perianal swabs, abdomen swabs, underwear, a skirt." "Twenty-five washcloths, oral swabs and two buccal swabs from Dion Matthews" were also collected for testing.

were admissible and that they tended to demonstrate that one plausible explanation regarding the sperm heads being found on K. was of Matthews' sexual abuse of her. Judge Greenberg acknowledged that Matthews could cross-examine the State's witnesses about his theory of innocent transfer by laundry, whereupon the State would be able to ask about the likelihood of innocent transfer.

Before us, Matthews contends that Judge Greenberg erred in denying the motion *in limine* because, he argues, the scientific evidence was not relevant to the question of his guilt insofar as the samples from K. tested negative for the presence of semen and seminal fluid, nor did they provide a DNA match. He further avers that the evidence of one to two sperm heads without tails or midsections on K.'s neck and clothing could not support the inference that the transfer resulted from sexual contact, as adverse to "innocent transfer" from the laundry and thus, should have precluded the experts' testimonies. Matthews additionally argues that the admission of such evidence was unfairly prejudicial because the jury relied too heavily on it, instead of focusing on K.'s credibility, which he posits, was the central issue of the case.

The State, before us, primarily contends that the issues raised in the motion *in limine* were not preserved, because Matthews did not object to the admission of the DNA and serological test results at the time of their introduction and when he did object, his objections were not on the same grounds that were contained in the motion *in limine*. In any event, the State posits that, even had Matthews properly objected to the introduction and admission of the DNA and serological test results, Judge Greenberg properly

exercised his discretion in concluding that their probative value outweighed any danger of unfair prejudice or jury confusion.

If a party's motion *in limine* is denied and "the trial judge admits the questionable evidence, the party who made the motion must generally object at the time the evidence is actually offered to preserve [the] objection for appellate review." *Reed v. State*, 353 Md. 628, 634 (1999) (quoting *Prout v. State*, 311 Md. 348, 356 (1988)). In *Morton v. State*, 200 Md. App. 529 (2011), this Court considered whether the appellant's argument in a motion *in limine* was preserved for appellate review when no objection to the testimony had been made at trial on the ground contained in the motion. In that case, prior to trial, in a motion *in limine*, Morton had sought to preclude the expert testimony of a nurse, contending that the State had failed to timely identify her as an expert witness, as required by Maryland Rule 4-263(d). *Id.* at 540. The trial court denied the motion and permitted the nurse to testify at trial. *Id.* After conducting voir dire of the nurse, prior to qualifying her as an expert, Morton objected to her testimony, "arguing that she was not qualified to render an expert opinion regarding the significance of her findings in a pediatric patient"; he did not renew his objection to the testimony based upon the discovery violation. *Id.* On appeal, this Court held that Morton "failed to preserve his 'discovery sanction' objection" to the expert's testimony. *Id.* at 541.

In the present case, counsel for Matthews did object to the testimony of Ms. Wolanin and Ms. Roller regarding their analyses of the DNA and serological testing on the ground that the State had failed to establish a proper chain of custody for samples collected from K. and her clothing and on confrontation grounds, neither of which are

before us. Matthews, like Morton, however, did not preserve for our review the admissibility of the scientific evidence on the grounds contained in his motion *in limine*, *i.e.*, relevance and laundry transfer, when he objected to the introduction of the DNA and serological evidence on different grounds at trial and thus, did not preserve the motion *in limine* regarding the scientific evidence.

Matthews, though, relying on *Watson v. State*, 311 Md. 370 (1988), a case which is inapposite here, argues that his counsel's oblique reference on two occasions to the motion *in limine* preserves the grounds of relevance and laundry transfer.

> [DEFENSE COUNSEL]: Ms. Roller, per her e-mail, agrees that there are innocent explanations such as the laundry that we discussed.
>
> THE COURT: Okay. I don't think the State disagrees with that. That's a matter for argument, isn't it?
>
> [DEFENSE COUNSEL]: Well, I would also disagree that it is a matter for argument for the State because –
>
> THE COURT: Well, I'm not going to revisit that, but I already said I think that it's a matter of weight and not admissibility. You're free to argue either way.
>
> ***
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> [DEFENSE COUNSEL]: Correct. Your Honor, going back to my motion in limine, our point was the DNA should not be admitted in this case period.
>
> THE COURT: We're not going to revisit that, okay?

Such oblique references to a motion *in limine* do not meet the threshold of preserving the grounds in a motion *in limine*. *See Morton v. State*, 200 Md. App. 529, 541 (2011). Thus, the motion *in limine* grounds were not preserved.

Although not preserved for our review, we shall address Matthews' contention that the trial court abused its discretion in denying his motion *in limine* in which he argued that the DNA and serological test results were not relevant because the evidence lacked probative value as they were inconclusive, and their introduction would be highly prejudicial and confuse the jury.[13]

To be relevant, evidence must tend "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. Under Rule 5-403, a trial court may exclude relevant evidence, if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

In balancing probative value against unfair prejudice, "we keep in mind that the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403." *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)). Rather, evidence is considered unfairly prejudicial when "it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is

[13] As a preliminary matter, it is important to note that Section 10-915 of the Courts and Judicial Proceedings Article, Maryland Code (1988, 2006 Repl. Vol., 2018 Supp.), provides that DNA evidence is admissible so long as certain notice requirements are met and the analysis is accompanied by a "statement from the testing laboratory setting forth that the analysis of genetic loci has been validated by standards established by" the Technical Working Group on DNA Analysis Methods, the DNA Advisory Board, the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories or the Federal Bureau of Investigation's Quality Assurance Standards for DNA Databasing Laboratories. The admissibility of the DNA evidence pursuant to the statute is not in issue here. *See Armstead v. State*, 342 Md. 38 (1996).

being charged." *Id.* The more probative the evidence, therefore, "the less likely it is that the evidence will be unfairly prejudicial." *Id.* The probative value of a particular piece of evidence may also be outweighed by the danger of unfair prejudice "when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.'" *Odum*, 412 Md. at 615 (holding that although evidence of felonies which petitioner was acquitted of in connection to his conviction for kidnapping "surely prejudiced him," the Court was not "persuaded that it *unfairly* prejudiced him, much less that the prejudice 'substantially outweighed' the probative value of the evidence." (emphasis in original) (citations omitted)).

With respect to probity, we have already, in *Clark v. State*, 218 Md. App. 230 (2014), held that DNA test results, even where inconclusive, were relevant "to show that the State performed a DNA test at all." *Id.* at 241. In that case, at trial, during the testimony of the State's forensic DNA and serology expert, a DNA report and the DNA swabs collected from a handgun were admitted into evidence. *Id.* at 240. The expert testified that the swabs collected from the handgun "yielded a mixed DNA profile from at least two contributors. The appellant was neither included nor excluded as a possible contributor." *Id.* On appeal, Clark argued that the trial court abused its discretion in denying his motion *in limine* to exclude from evidence the "inconclusive and therefore irrelevant DNA results from the gun." *Id.* at 237. We disagreed and affirmed the decision of the trial court. *Id.* at 240–41. Thus, even when inconclusive, DNA and serological test results have probity.

With respect to the risk of unfair prejudice, the Court of Appeals, in *Whack v. State*, 433 Md. 728 (2013), recognized that although "DNA is a powerful evidentiary tool and its importance in the courtroom cannot be overstated[,]" because jurors tend to "place a great deal of trust in [its] accuracy and reliability[,]" it has the "potential to be highly technical and confusing in a way that could unduly affect the outcome of a trial." *Id.* at 732 (citing *Maryland v. King*, 569 U.S. 435, 133 S. Ct. 1958 (2013)).[14] The probative value of DNA and other scientific evidence, however, is not outweighed by the danger of unfair prejudice per se. *See Armstead v. State*, 342 Md. 38, 62–63 (1996).

In the instant case, Judge Greenberg found that the DNA and serological test results, despite their inconclusive nature, were relevant because they did demonstrate that sperm heads were on K.'s body and clothing. Judge Greenberg further concluded that the admission of the test results would not confuse the jury nor influence them to disregard the other evidence adduced regarding the crime for which Matthews was charged:

> THE COURT: Why, why could that confuse them, especially since this is about credibility? You are attempting and will be attempting at trial to show that this child makes up stories, that she has [lied] before, that she's stolen before. And one of the lynch pins of what it is that the State is

[14] *Whack v. State*, 433 Md. 728 (2013) involved a challenge to the petitioner's conviction where the State, during its closing argument at trial, misconstrued the results of the DNA tests and greatly exaggerated their significance, arguing that it definitively proved the petitioner's guilt. Matthews similarly argues that he was prejudiced by the admission of the DNA and serological test results when the prosecutor, in her closing argument, claimed that the "DNA tells you the defendant did this." The record, however, indicates that the State acknowledged that the sperm heads could have been transferred to K. by secondary transfer through laundering, though minimizing the possibility of such happening. The prosecutor, thus, in the instant case, did not greatly exaggerate the importance of the scientific evidence or otherwise misconstrue it.

> alleging is that here's a piece of evidence that corroborates her story. So, why would that confuse them? Or why would that not be relevant to their inquiry?

We agree. The scientific evidence was appropriately admitted as relevant because its probity outweighed any prejudice or confusion.

Matthews contends that the trial judge further abused his discretion in admitting the DNA evidence because, he argues, only innocent transfer could explain the existence of trace sperm on K. In addressing Matthews' contention, Judge Greenberg concluded that the question of how sperm heads were transferred to K. would "go to weight rather than admissibility."

> THE COURT: Admittedly, admittedly, you have a study that says well, this is not a big deal. This can happen just by putting clothes in the wash. But the jury is also entitled to having been apprised of that to say, well, you know what, we don't think that that's what happened here. Because this young girl said that there was semen on her neck. I don't know if that's actually what she says, but the inference is there. And here's, how else is a spermatozoa head going to get on the neck of a child.

Our case law has shown that physical evidence, however, "need not be positively connected with the accused or the crime to be admissible; it is admissible where there is a reasonable probability of its connection with the accused or the crime[.]" *Boston v. State*, 235 Md. App. 134, 156 (2017) (quoting *Aiken v. State*, 101 Md. App. 557, 573 (1994), *cert. denied*, 337 Md. 89 (1995)), *cert denied*, 457 Md. 664 (2018); *see also Spriggs v. State*, 226 Md. 50, 52 (1961) ("We have repeatedly held that a probability of connection of proffered evidence with a crime is enough to make it admissible, its weight being for the trier of fact to evaluate.") (citation omitted); *Grymes v. State*, 202 Md. App. 70 (2011) (holding that the trial court properly exercised its discretion in admitting a gun into

evidence because it "was sufficient to create a 'reasonable probability' that the gun was connected to the appellant" and that it was within the province of the jury to determine the weight to give that evidence, despite the varied physical descriptions of it at trial). Essentially, although there may be other theories to explain the existence of the DNA and serological evidence, the inference to be drawn from a piece of evidence goes to its weight, rather than its admissibility. We, thus, conclude that Judge Greenberg acted within his discretion in denying Matthews' motion *in limine* to exclude testimony by the State's DNA and serology experts.

Matthews finally takes issue with Judge Greenberg's decision to admit statements K. made to Nurse Sandra Carlin during her examination of K. at Shady Grove Hospital, arguing that it was an abuse of discretion. At trial, prior to the testimony of Ms. Carlin,[15] counsel for Matthews had argued that the nurse should be precluded from testifying about the statements, because K., during her testimony, stated that she did not know why the nurse was asking her questions at the hospital. Judge Greenberg, however, disagreed but invited Matthews' counsel to "make appropriate objections":

> THE COURT: So, that's what I was saying earlier there may be some testimony from this witness as to what communication she had with the alleged victim in this case. Just because the alleged victim doesn't specifically say I understood this is why I was being asked these questions, doesn't mean the statement is not a spontaneous one and not responsive to the treatment questions, or the concerns that the treating [ ] nurse has. So, I'm going to, I'm going to at least temporarily overrule. Well, we've already dealt with that. You sort of wanted to revisit the question. You can make appropriate objections, but obviously the State may want to lay some

[15] Matthews also sought to preclude from admission statements K. made to Ms. Carlin during the examination in a pre-trial motion *in limine*, which Judge Greenberg denied.

> further foundation as to why this statement would be admissible, perhaps by way of an explanation given by the [ ] nurse to the alleged victim before she asked her questions.

During the course of the nurse's testimony, Judge Greenberg sustained objections to the admission of statements made by K. when they were not in furtherance of medical treatment, but also overruled defense counsel's objections to statements K. made to Ms. Carlin that were in furtherance of medical diagnosis and/or treatment.

> [THE STATE]: And what did [K.] say to you when you asked why are you here?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [MS. CARLIN]: I had written in my notes that my dad's been doing nasty stuff to me.
>
> ***
>
> [MS CARLIN]: I took my narrative medical history from her and documented in the chart.
>
> [THE STATE]: And what did she say to you?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [MS. CARLIN]: Her response was my dad's been doing nasty stuff to me. He's been going on top of me and going up and –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [MS. CARLIN]: -- up and down. He takes of[f] his, and then, this is not in quotes, but she said he takes off his underwear. For the incident that she described that occurred that morning and she said her underwear stayed on. And she said this happened today before she went to school. This morning

when this occurred her underwear were wet. She removed her underwear and changed into dry underwear, then she went to school. She told her teacher, Ms. Stephenson, what happened, and the patient, I asked but the patient denied any complaints at this time.

***

[THE STATE]: Did you ask from there after her narrative of the medical history of the assault, did you then ask more specific questions of [K.]?

[MS. CARLIN]: I did.

[THE STATE]: And what were those questions?

[MS. CARLIN]: We were asking if she was touched anywhere else. She mentioned.

[DEFENSE COUNEL]: Objection.

THE COURT: Overruled.

[MS. CARLIN]: His pee hole went in my butt and then patient stated that his underwear were off and then, again, he's been going on top of me and going up and down. That was mentioned when we were asking about the incident.

***

[THE STATE]: Did you ask [K.] about ejaculation?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. You can answer.

[MS. CARLIN]: I did not ask her in those terms. She commented that her underwear were wet.

[DEFENSE COUNSEL]: Objection.

THE COURT: Well, she's already testified to that, so.

Counsel for Matthews did not object to any other portion of Ms. Carlin's testimony that relayed statements made to her by K. on the basis that they were not made in furtherance of medical diagnosis and/or treatment.

Matthews argues that his objections should not have been overruled, because K., as indicated by her trial testimony, did not know why Ms. Carlin was asking her questions during the examination, thereby diminishing the reliability of any statements K. made. As such, Matthews contends that the statements K. made to the nurse were inadmissible hearsay, as they were not made in furtherance of medical diagnosis or treatment, pursuant to Rule 5-803(b)(4).[16]

The State, on the other hand, posits that the statements made to Ms. Carlin were admissible because the examination was in response to a report of sexual abuse, during which K. relayed to the nurse facts pertinent to her medical diagnosis and/or treatment resulting from that abuse.

Judge Sally Adkins, writing for this Court in *Webster v. State*, 151 Md. App. 527 (2003), a case in which the examining nurse did not expressly provide the child-victim with a medical explanation for the examination the child received, noted several circumstances in that case which supported the trial court's conclusion that the statements

[16] Rule 5-803(b)(4) embodies a hearsay exception for statements made for diagnosis or treatment, which are defined as:

> Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause of external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

made by the child to the examining nurse were made for the purpose of medical diagnosis and/or treatment, and as such, were admissible pursuant to Rule 5-803(b)(4). *Id.* at 550. In that case, the child was questioned in "emergent circumstances, within a few hours of the assault, in a hospital setting." *Id.* at 551. The interview was also conducted by a "registered and presumably uniformed nurse." *Id.* The interview immediately followed the child's "brief examination in the emergency room" where another medical professional "performed medical procedures, such as blood pressure and pulse checks, which young children experience even when seeking routine medical care." *Id.* at 551–52. Furthermore, "in contrast to the ambiguous 'who did this' questions . . . the very specific 'what happened' information" that the nurse solicited from the child was "consistent with questions that nurses and doctors commonly ask even young children when they seek medical assessment and treatment." *Id.* at 552. Lastly, the Court noted that the child's responsive answer to that question, that a man had licked her "tu-tu," referring to her vaginal area, and "later description of her experience at the hospital in medical terms (*i.e.*, 'when I got a needle')" also supported the trial court's finding that the child understood that there was a medical reason for truthfully telling the nurse what had happened to her. *Id.* The Court additionally recognized that "telling a patient that the information she provides will help in diagnosis and treatment would support the admissibility of responsive statements[.]" *Id.* at 550.

Many of the *Webster* circumstances are present in the instant case and support Judge Greenberg's findings and determination regarding the admissibility of K.'s statements to Ms. Carlin. At trial, Ms. Carlin testified that she first met K. "in the

pediatric emergency room" wherein she introduced herself as a nurse and explained that she was going to perform a medical examination of K. The interview had taken place on the same day as the assault. Prior to the examination, K. had her vitals checked by emergency room personnel. Ms. Carlin also informed K. that the purpose of the exam was to determine whether she had any injuries or "boo boos" and that she would be looking at her from "head to toe," including her "private area." Ms. Carlin also sought K.'s permission, which was given, before conducting the examination. When the nurse asked K. why she was at the hospital, K. informed her that her father had been doing "nasty stuff" to her and provided greater detail.

The breadth of the circumstances supporting the purpose of medical treatment clearly support Judge Greenberg's decision to admit various of K.'s statements to Ms. Carlin; he did not err. We, therefore, hold that Judge Greenberg properly exercised his discretion in permitting Ms. Carlin to testify about K.'s statements because they were made in a treatment framework and, thus, admissible under Rule 5-803(b)(4).

In conclusion, we affirm Matthews' convictions.

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