Circuit Court for Baltimore County
Case No. 03-K-17-003207

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 51

September Term, 2019

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KENNETH ALBERT WARTMAN, III

v.

STATE OF MARYLAND

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Graeff,
Reed,
Gould,

JJ.

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Opinion by Reed, J.
Concurring Opinion by Gould, J.

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Filed: August 17, 2020

A jury sitting in the Circuit Court for Baltimore County found Kenneth Albert Wartman, III ("Appellant") guilty of three counts of sexual abuse of a minor, two counts of second-degree rape, two counts of incest, five counts of second-degree assault, one count of second-degree sexual offense, three counts of third-degree sexual offense, and three counts of fourth-degree sexual offense. The court sentenced Appellant to life in prison, plus 90 years, with the first 15 years to be served without the possibility of parole. Appellant raises three questions on appeal:

I. Did the trial court err by excluding evidence of K.'s prior sexual activity to explain the source of the physical trauma?

II. Did the trial court abuse its discretion by permitting the prosecution to elicit improper lay opinion testimony on two different occasions?

III. Did the trial court err by permitting the prosecutor to conduct improper cross examination of Appellant?

For the following reasons, we shall affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

At trial, numerous facts were elicited by the State and Appellant through witness testimony and evidence admitted for the jury's consideration. We will limit our discussion of the background facts to those necessary to provide context for the issues raised in this appeal. Additional facts will be introduced in our discussion of the issues, as those facts become relevant.

Appellant, 33 years old, was charged in a 28-count indictment with multiple counts of rape; incest; sexual abuse of a minor; sexual offense in the second-, third-, and fourth-

degree; and second-degree assault. The alleged victims were Appellant's daughter, K., and K.'s best friend, A.

K. testified that when she was 11 years old, Appellant touched her vagina while she was sleeping and, on another occasion, digitally penetrated her. When K. was 12 years old, Appellant had vaginal intercourse with her on multiple occasions.[1] Appellant told K. "it's our little secret."

A. testified that Appellant began kissing her when she was about 10 years old. At some point, she and Appellant started texting each other all day, every day. Appellant told A. that he wanted to follow her to college, get married and have children with her. Appellant called A. "wifey," and A. called Appellant "hubby." Appellant became "extreme[ly]" jealous whenever A. spent time with her family or friends.

During a sleep over at K'.s house, Appellant came into the room where A. was sleeping, removed her clothing, and took pictures of her vagina while she was half asleep. Appellant frequently asked A. to send him nude pictures of herself, which she did to avoid an "argument" that she did not "lov[e] him enough." Appellant stored the nude photographs of A. on his phone, in a password-protected application called "photo vault."

When A. was 11 or 12 years old, Appellant touched A.'s vagina for the first time. Appellant then began touching A. inappropriately "literally everywhere": on joint family vacations, in his car, in her house, in his house, in his parent's house, "[a]nywhere he got the chance." When she was asked to tell the jury how many times Appellant touched her,

[1] Appellant was charged with three counts of raping K, and was convicted of two of those counts.

A. responded, "A lot of times. Oh, my God. A lot of times. I can't tell how many times, it's too many." Eventually, the inappropriate touching progressed to digital penetration and numerous acts of cunnilingus.

Dr. Michelle Chudhow testified for the State as an expert witness in child abuse pediatrics. Dr. Chudhow examined A. and K. after the incidents of rape and sexual abuse were reported. A.'s genital exam was "normal" and revealed no injury or trauma.

K's genital exam revealed that she had a "complete transection," or tear, of the tissue of her hymen. K. told Dr. Chudhow that she experienced vaginal bleeding immediately after Appellant raped her. The injury was healed, signifying that it had occurred at least a month prior to the exam on June 22, 2017.[2] Dr. Chudhow stated her opinion that, within a reasonable degree of medical certainty, given the history reported by K. and the location of the transection, the injury to K.'s hymen was "definitely caused by sexual abuse or sexual trauma."

On cross-examination, Dr. Chudhow agreed with defense counsel that the injury could have resulted from consensual sex. Dr. Chudhow stated that she had asked K. about her sexual history, out of the presence of K.'s mother, and K. responded that she was not sexually active.

[2] According to K., the last time appellant raped her was April 27, 2017.

## DISCUSSION

### I. Evidence of Prior Sexual Conduct

Just before opening statements, the State made a motion in limine to preclude a defense witness from "blurt[ing] out" information regarding the victims that would be inadmissible under Maryland's rape shield statute, Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 3–319.[3] That statute provides that 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 specified sexual offenses, including rape, subject to limited exceptions and procedural prerequisites.[4]

[3] As the Court of Appeals has noted, although commonly referred to as Maryland's "rape shield statute," the provisions of §3-319 apply not only in prosecutions for rape but extend to trials involving a wider variety of sexual crimes. *White v. State*, 324 Md. 626, 633 n.1 (1991).

[4] Section 3-319 of the Criminal Law Article provides in full:

> (a) *Reputation and opinion evidence inadmissible.* -- 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;
> (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) *Specific instance evidence admissibility requirements.* -- 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;

In response to the motion in limine, defense counsel stated that there were exceptions to the statute that might become applicable, depending on what the evidence at trial would show. The court reserved its ruling on the motion.

During the cross-examination of K., defense counsel asked to approach the bench and advised the court that, "[d]ue to the physical evidence from the medical examiner regarding the vaginal transection," he intended to ask K. "if she ever had sex." The court agreed with the prosecutor that the proposed question went "directly to rape shield," and stated that an objection to the question would be sustained. The following colloquy then ensued:

> [DEFENSE COUNSEL]: The statute does say when it comes to the particular source of the injuries, this sort of question is admissible.
>
> [THE COURT]: I know it does. So what is your other theory?

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> (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.
> (c) *Closed hearing.* -- (1) Evidence described in subsection (a) or (b) of this section may not be referred to in a statement to a jury or introduced in a trial unless the court has first held a closed hearing and determined that the evidence is admissible.
> (2) The court may reconsider a ruling excluding the evidence and hold an additional closed hearing if new information is discovered during the course of the trial that may make the evidence admissible.

> [DEFENSE COUNSEL]: Well, if she sustained an injury to her vagina, if she had sex before it could have been caused by numerous situations. If not, then it could have only been her father. That's very important.
>
> THE COURT: You just answered the question. I'm not gonna allow it at all. You don't have any evidence upon which to base such a line of cross-examination, you're just looking to create some cloud, I think, by asking these questions and then suggesting that this young woman had relations with other people, and I'm not gonna allow that.
>
> [DEFENSE COUNSEL]: Your Honor, I have no evidence that's been introduced in Court, yet, but I do have reason to believe that she had been sexually active by all means. So, for that reason, I think it's extremely relevant and necessary, because otherwise - -
>
> THE COURT: Okay. You're gonna object, I'm gonna sustain the objection. You've made your record.

When cross-examination resumed, defense counsel established that K. had her first boyfriend when she was 12 years old and had sent nude photographs of herself to her boyfriend and to other boys. In response to defense counsel's question about the results of the vaginal examination that was performed after she reported the rape, K. stated, "I know that my father had broken my hymen." Defense counsel then asked whether there was "any other" possible explanation for the injury, eliciting an objection from the prosecutor, which the court sustained.

### A. Parties' Contentions

Appellant contends that the trial court abused its discretion in excluding evidence of K.'s prior sexual history. He argues that such evidence was admissible under the exception in §3-319(b)(4)(ii), which conditionally allows for the admission of evidence of "a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma[.]" Appellant asserts that such evidence would tend to prove the defense

theory of the case, which was that the trauma to K.'s hymen was "caused by another source, such as consensual sex with another adolescent."

The State asserts that "defense counsel's suggestion that he had 'reason to believe' that K. had been sexually active was inadequate" to satisfy the requirements for admissibility of a victim's prior sexual conduct under §3-319(b). The State maintains that the statute demands, "at a minimum, some proffer as to what [defense] counsel's 'reason to believe' actually was[.]"[5] The State contends that, "in the absence of any substantive proffer regarding the basis for defense counsel's professed 'reason to believe' that K. had engaged in sexual activity with others," the ruling was an appropriate exercise of the court's discretion. The State submits that, without any evidence to support the suggestion that K. had engaged in consensual vaginal intercourse with someone else, the purpose of the cross examination was "nothing more than a fishing expedition[,]" that was clearly violative of §3-319.

**B. Standard of Review**

Evidence of a victim's prior sexual conduct is not admissible in a prosecution for rape and other sexual crimes unless three conditions are met: "(1) the evidence must be relevant and material to an issue in the case, (2) the prejudicial nature of the evidence must not outweigh its probative value, and (3) the evidence must fall within one of the four

[5] The State also contends that any evidence of prior sexual conduct was inadmissible because the court did not hold a closed hearing as required by §3-319(c). No hearing was required to determine the admissibility of evidence of prior sexual conduct because, as we shall explain, Appellant did not proffer any evidence of prior sexual conduct for the court to hear and consider.

statutorily enumerated categories." *Smith v. State*, 71 Md. App. 165, 182 (1987) (citation omitted); CR § 3-319(b). "In evaluating these three conditions, decisions on the relevance or inflammatory nature of the evidence rest in the sound discretion of the trial court[.]" *Id.* We will not reverse the decision of the trial court absent an abuse of that discretion. *Id.*

**C. Analysis**

"The principal reason for the rape shield statutes is to shield victims of sex crimes from general inquiry into their past sexual conduct and to keep these victims from feeling that they are on trial." *White v. State*, 324 Md. 626, 633–34 (1991) (quoting *Stephens v. Morris*, 756 F. Supp. 1137, 1142 (N.D. Ind. 1991)). "If [the victim] has reason to believe the most intimate details of [their] life are going to be bandied about the courtroom, many victims will decide the game is not worth the candle and decline to file a complaint." *Id.* at 634 (quoting *Goodson v. State*, 566 So.2d 1142, 1149–50 (Miss. 1990)).

"In enacting the Rape Shield Statute, the legislature clearly intended to strike a balance between the need to protect victims from undue embarrassment at trial and the constitutional right of defendants to confront witnesses against them." *Smith*, 71 Md. App. at 189. Accordingly, § 3-319 provides exceptions to the general rule of inadmissibility which "provide ways for a defendant to bring up a victim's conduct when necessary to the defense." *White*, 324 Md. at 636. Here, Appellant contends that evidence of K.'s prior sexual conduct was admissible pursuant to the exception in §3-319(b)(4)(ii), which provides that evidence of a "specific instance of a victim's prior sexual conduct" may be

admissible if the evidence "is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma[.]"[6]

Pursuant to §3-319(b), for evidence of a specific instance of a victim's prior sexual conduct to be admitted to explain such things as the source of semen or trauma, the trial court must first make a determination that the evidence is relevant and material to a fact in issue in the case, and that the probative value of the evidence is not outweighed by its inflammatory or prejudicial nature. "In order to establish the relevance and materiality required by [§3-319], the offer of proof must be specific as to when the sexual contact took place and a proper medical foundation must be made to establish, scientifically, the probative value of the testimony." *Smith*, 71 Md. App. at 187. "To allow the defense to engage in a 'fishing expedition' or to admit [evidence of a victim's prior sexual conduct] without a foundation to show its relevance would be contrary to the intent of [§3-319]." *Smith*, 71 Md. App. at 188–89.

In *Smith*, the State introduced evidence that forensic testing of vaginal swabs, which were taken from a rape victim on the date of the alleged rape, indicated the presence of acid phosphatase, a male sexual fluid. *Id.* at 182–83, 189. The defendant attempted to

[6] The State concedes, and we agree, that the exception in §3-319(b)(4)(ii) is conditionally applicable in a case such as this, where the victim sustained an injury to the hymen, allegedly as a result of the rape. *See e.g. State v. DeLawder*, 28 Md. App. 212, 214– 15 (1975) (evidence that rape victim had sexual intercourse with other men is inadmissible except when the hymen of the victim has been ruptured or injured and it is alleged that the trauma was caused by the defendant) (decided prior to the enactment of §3-319).

question the victim about other sexual contact she may have had shortly before the alleged attack, proffering to the court that, because the source of semen was an issue, the defendant had "a right to indicate to a jury that the semen could have been there from the victim's activities on Thursday night, could have been there from her activities on Friday night." *Id.* at 188 n.14. The trial court granted the State's motion to preclude the line of questioning. *Id.* at 181.

Smith appealed his convictions, asserting that "evidence of the victim's prior sexual contact would establish a possible source, other than himself," of the acid phosphatase. *Id.* at 183. We affirmed, holding that the evidentiary proffer was insufficient. *Id.* at 188. We noted that a proper foundation in that case would have included a proffer "that the victim had sexual intercourse at a reasonably specific time before the incident with a person other than the defendant and that, scientifically, prior sexual contact could have accounted for" the presence of acid phosphatase. *Id.* at 189; *see also Bell v. State*, 118 Md. App. 64, 91 (1997) (holding that trial court did not abuse its discretion in precluding defendant from asking the victim if she had engaged in sexual relations in the 72 hours preceding the alleged rape where defendant "failed to lay any foundation" as to prior sexual contact that could account for the presence of sperm in the victim's endocervix), *rev'd on other grounds*, *State v. Bell*, 351 Md. 709 (1998).

Applying the principles and reasoning in *Smith* to the facts of this case, we hold that the trial court did not abuse its discretion in precluding defense counsel from asking K. about her prior sexual activity. Defense counsel did not articulate any evidentiary basis for the line of questioning. Defense counsel's bare assertion that he had a reason to believe

that K. had been sexually active was not a proffer of evidence and did not provide the court with any information from which the court could have made a determination that evidence of a specific instance of prior sexual conduct was admissible under §3-319(b)(4)(ii). In the absence of any reasonably specific information about the nature of the alleged sexual activity and when it occurred, the court had no way to determine whether the alleged prior sexual conduct was relevant and material to show, as the defense sought to do, that the source of the trauma to K.'s hymen was someone other than Appellant. Nor did the court have any information with which to determine whether the probative value of the evidence would substantially outweigh any undue prejudice to K.

We reject Appellant's argument that "the substance of the evidence was apparent from context[,]" i.e., that defense counsel "had knowledge of an instance of K.'s prior sexual conduct that could explain the trauma to her hymen." If that was all that was required to circumvent the protections of the rape shield statute and allow a defendant to question the victim about prior sexual conduct, a defendant would merely have to profess to have some knowledge of some prior sexual conduct that was somehow relevant to an issue in the case, without providing any information regarding the source, nature, or extent of that knowledge for the court to evaluate for relevance, materiality, and potential for prejudice. Here, if defense counsel was indeed in possession of any information to support his belief that K.'s prior sexual activity could explain the source of the hymenal transection, it was incumbent upon counsel to disclose the details of that information to the court so that the court could make the determination required by §3-319(b).

In his reply brief, Appellant argues that §3-319 does not require that the proffer include details of the prior sexual conduct such as the identity of the sexual partner or where or when the sexual conduct took place. He asserts that the holding in *Smith*, 71 Md. App. at 187, where we stated that the "offer of proof must be specific as to when the sexual contact took place," does not apply here because *Smith* involved the presence of semen, and therefore, "the proffer in that case needed to specify the timeframe of the prior sexual contact to establish that the sexual contact took place close enough in time to the rape to have probative value."

Although there is no case law in Maryland addressing the adequacy of a proffer to demonstrate that a victim's prior sexual conduct is admissible to prove the source of an injury to the hymen in a rape case, we find guidance in *People v. Prentiss*, 172 P.3d 917 (Colo. 2006). In *Prentiss*, the prosecution introduced evidence that a post-rape examination of the 13-year-old victim revealed a "small healed tear in her hymen, consistent with vaginal penetration by a blunt object such as a penis." *Id.* at 921. The trial court precluded the defendant from asking the victim whether she had been sexually active with anyone other than him. *Id.* at 921. The Colorado Court of Appeals affirmed, holding that the defendant failed to make a sufficient offer of proof that the victim's hymenal injury was caused by any prior sexual activity, stating:

> Although [the victim] admitted . . . that she had "boyfriends," she never admitted or even suggested she had engaged in any sexual activity with them, much less vaginal intercourse. She was specifically asked . . . whether anybody else had ever touched her in the same way that defendant did, and she said no. And, during her physical examination, she told the medical expert she was not aware that any other kind of prior vaginal penetration had occurred.

> Thus, there was no evidence suggesting the victim had engaged in prior sexual activity with anyone. Contrary to defendant's contention, the fact that she was physically well developed and had been in special education classes with potential juvenile offenders did not provide a sufficient basis for inferring she was sexually active and had had intercourse.

*Id.* at 924. The court noted that a foundation to permit cross-examination of a victim regarding prior sexual activity "need not be extensive, but here none was shown." *Id.* at 926. In this case, as in *Prentiss*, there was no evidence suggesting that K. had engaged in prior sexual activity with anyone, and no foundation for the proposed line of questioning was shown.

Other cases cited in *Prentiss* illustrate circumstances under which a proffer of evidence of a victim's prior sexual conduct might be sufficient to allow the introduction of such evidence in a case involving an injury to the victim's hymen. *Id.* at 923. For example, in *Tague v. Richards*, 3 F.3d 1133, 1136–37 (7th Cir. 1993), the examining physician testified, in a closed hearing, that the 11-year-old victim told him that she had previously been molested by her father. In *People v. Mikula*, 269 N.W.2d 195, 197 (Mich. 1978), the defendant proffered the existence of a police report that contained an allegation that the child victim "had been involved in a sexual incident with a 14-year-old boy some months prior to the alleged incident with the defendant." And in *State v. Brown*, 29 S.W.3d 427, 431 (Tenn. 2000), the defendant offered proof that the 11 year old victim told a friend that she had been having sex with a boyfriend.

Although the relevancy and materiality of evidence of prior sexual conduct will be dependent on the particular facts and circumstances of each case, a proper foundation in

this case would have included, at a minimum, a proffer of evidence showing that K. had engaged in sexual activity that could have caused a hymenal transection, such as vaginal intercourse, with someone other than Appellant, prior to Dr. Chudhow's examination of K. in June 2017. *Accord State v. DeLawder*, 28 Md. App. 212, 215 (1975) (although a defendant in a carnal knowledge prosecution may introduce evidence of a victim's prior acts of unchastity when it is alleged that the victim's hymen was ruptured or injured due to the acts of the defendant, "[t]he only acts of intercourse . . . which may be shown are those occurring about the time of the act, which, in the nature of things, could have caused the condition.") (decided prior to the enactment of §3-319).

In sum, defense counsel's unsubstantiated belief that K. had been sexually active, without more, was insufficient to invoke a statutory exception to the rape shield statute. The court was well within its discretion to preclude defense counsel from questioning K. about any prior sexual conduct.

**II. Lay Opinion Testimony**

Appellant contends that the court admitted improper lay opinion testimony on two occasions. The first instance was when the prosecutor asked A. about the "photo vault" application on Appellant's cell phone, where he stored the nude photos of her:

> [PROSECUTOR]: Did you ever see the photos that you sent him on his phone?
>
> [A.]: Yes.
>
> [PROSECUTOR]: Where would they be on his phone?
>
> [A.]: He had this app called photo vault. I can't remember what it looks like. It might have been disguised as a calculator or it might have just said photo

[v] ault with maybe like a little key on it or something, but it was like hidden in one of like the folders you could have on your phone, and it was like password protected.

[PROSECUTOR]: How did you know he had photo [vault] on his phone?

[A.]: Because I would like play on his phone all the time, or like we play music in the car or something, and I would just - - well, snooping, which I probably shouldn't have been doing, but I guess it is what it is now.

[PROSECUTOR]: Did you know the code to get into his photo vault?

[A.]: I think he told me. I definitely remember punching it in one time and seeing the pictures, but I don't know how I got the passcode. I definitely didn't know them, and so I think he told me it.

* * *

[PROSECUTOR]: Did you have a photo vault on your phone?

[A.]: No.

[PROSECUTOR]: Do you know people who have used photo vaults, other than [Appellant]?

[A.]: Yes.

[PROSECUTOR]: Why would someone use a photo vault?

[A.]: Usually to hide - -

[DEFENSE COUNSEL]: Objection, your Honor.

THE COURT: Overruled. You may answer.

[A.]: In my experience, usually to hide something like - - just put something in that they don't want other people to see. Maybe it's like an ugly picture or something. I don't know, maybe you were doing something illegal. I don't know but, at least, in my experience that's why they have a photo [vault].

The second instance of alleged improper lay opinion came from Detective Brian Jeunette, the lead investigator in the case. Detective Jeunette was asked about data

extracted from Appellant's cell phone which showed that, after K. reported the abuse, Appellant's search history for A.'s last name on social media websites, such as Facebook and Twitter, increased significantly, up to more than a hundred times a day.[7]

> [PROSECUTOR]: Now, when you receive that search history, why was that entire history of the searches significant?
>
> [Detective Jeunette]: Well, it shows guilt of conscious [sic] to me.
>
> [PROSECUTOR]: Why?
>
> [Detective Jeunette]: [Appellant] was so used to being with both of these girls. When he wasn't allowed to be around these girls, he started searching for them in other ways, trying to learn about them in other ways. The easy way he did that through the search engine on his phone - -
>
> [DEFENSE COUNSEL]: Objection, your Honor. I would move to strike all of that as improper opinion.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: You may answer.
>
> [Detective Jeunette]: So, he's trying to find out about them because he hasn't had access to them. So he's doing whatever he can to find out about them whether it be through Facebook, Instagram or any other measure through the internet.

**A. Parties' Contentions**

Appellant contends that A.'s opinion that a person would use a photo vault application to hide illegal activity constituted improper lay opinion testimony. He asserts that A. "was not speaking from personal knowledge, observation, or perception, but was

[7] According to the prosecutor, Appellant's cell phone data showed 1,347 internet searches for A.'s last name in a 24-day period in May 2017, when the rape and sexual abuse was reported.

'obviously speculating.'" The State asserts that A.'s testimony was based on her personal knowledge and experience.

Appellant claims that Detective Jeunette, who had "performed a merely technical function" in downloading and compiling data from Appellant's cell phone, had no basis for expressing an opinion about Appellant's thoughts and intentions. The State maintains that Appellant's objection to the detective's testimony was untimely and therefore waived. Alternatively, the State submits that the detective's testimony was based on his experience investigating child sexual abuse cases.

**B. Standard of Review**

"Pursuant to the Maryland Rules of Evidence, a lay witness may testify to those opinions or inferences which are '(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.'" *Paige v. State*, 226 Md. App. 93, 125 (2015) (quoting Md. Rule 5–701.) "The decision to admit lay opinion testimony is vested within the sound discretion of the trial judge[.]" *Id.* at 124 (quoting *Warren v. State*, 164 Md. App. 153, 166 (2005)). "We will not disturb a trial court's evidentiary ruling unless . . . there is a clear abuse of discretion." *Walter v. State*, 239 Md. App. 168, 200 (2018) (quoting *Moreland v. State*, 207 Md. App. 563, 568–69 (2012)).

**C. Analysis**

"The rationale for the standard set by [Maryland] Rule 5–701 is two-fold: the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge of the witness." *Paige*, 226 Md. App. at 125

(quoting *State v. Payne*, 440 Md. 680, 698 (2014)). "The personal knowledge prerequisite requires that [e]ven if a witness has perceived a matter with his senses, he must also have the experience necessary to comprehend his perceptions. The rational connection prerequisite requires that there be rational connection between th[e] perception and the opinion." *Id.* (quoting *Rosenberg v. State*, 129 Md. App. 221, 255–56 (1999)) (additional citation and internal quotation marks omitted).

Based on our review of the record, A.'s testimony about the photo vault application was rationally based and premised on her personal knowledge. She had seen and used the photo vault application on Appellant's phone, was familiar with how it worked, and was aware that Appellant used the photo vault to store nude photographs of her, a 12-year-old girl. The court did not abuse its discretion in allowing A. to explain reasons a photo vault might be used.

Also, any error would appear to be harmless as, later in the trial, the State called Ashley Hoffman, who was accepted by the court as an expert in the field of computer forensics and cell phone extraction data analysis. Ms. Hoffman was asked to tell the jury what a photo vault is and how it operates. Ms. Hoffman explained that a photo vault is a cell phone application to protect photos and videos, stating, by way of example, that "if [someone] had an album that [they] didn't want someone to see," they could shield that album from view by setting up a password to access it. *See Yates v. State*, 202 Md. App. 700, 709 (2011) ("where a witness later gives testimony, *without objection*, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless.") (quoting *Robeson v. State*, 285 Md. 498, 507 (1979)).

As for Detective Jeunette's testimony, we agree with the State that the objection was waived. Maryland Rule 4–323(a) provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for the objection become apparent. Otherwise, the objection is waived." When a question by opposing counsel "calls for an inadmissible answer, counsel must object immediately. Counsel cannot wait to see whether the answer is favorable before deciding whether to object." *Bruce v. State*, 328 Md. 594, 628 (1992) (quoting 5 L. McLain, *Maryland Evidence*, § 103.3 at 17 (1987)). If defense counsel "could or should have known from the question that the answer would be objectionable," but fails to object before the answer is given, the objection is waived. *Id.* at 629–30.

Appellant's argument on appeal is that the detective had no basis for testifying about Appellant's thoughts or intentions, and that the prosecutor "ought not have asked" the detective to express an opinion. But at trial, defense counsel did not object when Detective Jeunette stated that Appellant's search history was significant because it showed consciousness of guilt. Moreover, defense counsel failed to object when the prosecutor asked the detective to explain the basis for his opinion, a question which Appellant now claims the prosecutor "ought not have asked." Here, as in *Bruce*, defense counsel "should have been able to anticipate the nature of the response and make his objection in advance" of the answer. *Id.* at 630. Because defense counsel did not object until the answer was given, the objection was waived.[8]

[8] We are not persuaded by Appellant's argument urging us to reject the State's preservation argument because the objection was made "as soon as practicable for

Even assuming the objection was not waived, any error would be harmless. An error in admitting evidence is harmless if the reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of -- whether erroneously admitted or excluded -- may have contributed to the rendition of the guilty verdict." *Nicholson v. State*, 239 Md. App. 238, 244 (2018) (quoting *Dionas v. State*, 436 Md. 97, 108 (2013)) (additional citation omitted), *cert. denied*, 462 Md. 576 (2019). We are satisfied upon our review of the record that there is no reasonable possibility that the jury's verdict was influenced by the detective's opinion that Appellant's extensive social media searches for A.'s name demonstrated consciousness of guilt because he was looking for information about her.

## III. Cross-Examination

Appellant testified in the defense portion of the case and denied all allegations of rape and sexual abuse. On cross-examination, the prosecutor asked appellant about the consequences K. had experienced as a result of reporting the rape and sexual abuse:

> [PROSECUTOR]: So, would you say that [K.] lost her father? You're incarcerated at the moment?
>
> [APPELLANT]: Obviously.
>
> [PROSECUTOR]: Would you say that [K.] lost her relationship with her grandparents?
>
> [APPELLANT]: By her and her mother's choice, yes.

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counsel[.]" Appellant gives no explanation for the delay, and we see nothing in the record indicating that defense counsel did not have an opportunity to object until after the question was answered.

[PROSECUTOR]: [K.] lost aunts and uncles?

[APPELLANT]: At their choice, yes.

[PROSECUTOR]: You heard [K.] testify that she's having boys ask her to do things to them, correct?

[APPELLANT]: [K.] had that before –

* * *

[PROSECUTOR]: You think [K.] enjoy[ed] telling 12 strangers about her first sexual experience - -

[DEFENSE COUNSEL]: Objection, your Honor.

[APPELLANT]: I can't tell how - -

THE COURT: Overruled.

[APPELLANT]: I can't tell how [K.] feels. . . .

[PROSECUTOR]: You think [K.] enjoyed telling them about sex with her father?

[APPELLANT]: Well, since it didn't happen, I can't tell you what she felt, again.

[PROSECUTOR]: So you think she enjoyed that, it was fun for her?

[APPELLANT]: Like I also said, it never happened, not once, not twice, not three, not any time.

**A. Parties' Contentions**

Appellant contends that the cross-examination was improper because (1) it was irrelevant under Maryland Rule 5-402 and, (2) constituted an improper "golden rule" argument that was "phrased in the form of questions." He maintains that "[t]o invite the jurors to consider how it would feel to be forced to testify about intensely personal,

traumatic and embarrassing events in front of 12 strangers and the public at large was to attempt to distract them from their duty and abandon their objectivity."

The State asserts that the objection was not preserved, but even if preserved, Appellant's argument is without merit. The State maintains that the "golden rule" only applies to improper closing argument to a jury, not cross-examination of a witness, and that in any event, the prosecutor was not asking the jurors to put themselves in the shoes of K., but was pointing out "the cost to K. of coming forward, which was relevant to her credibility."

**B. Standard of Review**

"[M]anaging the scope of cross-examination is a matter that falls within the sound discretion of the trial court." *Mines v. State*, 208 Md. App. 280, 295 (2012) (quoting *Simmons v. State*, 392 Md. 279, 296 (2006)). "This discretion is exercised by balancing 'the probative value of an inquiry against the unfair prejudice that might inure to the witness.'" *Pantazes v. State*, 376 Md. 661, 681 (2003) (quoting *State v. Cox*, 298 Md. 173, 178 (1983)). "We will not disturb such a ruling absent a showing of prejudicial abuse of discretion." *Mines*, 208 Md. App. at 295 (citing *Fleming v. Prince George's County*, 277 Md. 655, 679 (1976)).

**C. Analysis**

"[T]o preserve an objection, a party must either object each time a question concerning the [matter is] posed or...request a continuing objection to the entire line of questioning." *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (internal quotation marks and citation omitted). Although Appellant contends that the prosecutor asked a "series of

badgering questions" the sole purpose of which was to "inflame the sympathies of the jurors," defense counsel asserted an objection to only one question: "You think [K.] enjoy[ed] telling 12 strangers about her first sexual experience?" After that objection was overruled, the prosecutor asked Appellant a more pointed version of the same question: whether he thought "[K.] enjoyed telling them [the jury] about sex with her father." Because defense counsel did not object to the prosecutor's second question regarding K.'s feelings about telling the jury what happened, the claim of error was not preserved.

Even if the objection had been preserved, Appellant's argument that the cross-examination was irrelevant under Maryland Rule 5-402 lacks merit.[9] "[A] witness's credibility is always relevant[,]" especially where, as in this case "the trier of fact must rely primarily—if not solely—on witness testimony to assess guilt or innocence[.]" *Devincentz v. State*, 460 Md. 518, 551 (2018) (citing *Cox*, 298 Md. at 185).

Appellant took the stand and maintained that he was innocent of all charges of rape and sexual abuse. He characterized K.'s testimony as "wild accusations," and said that K. and A. had told "horrible stories of accusations that did not happen." The defense called seven character witnesses, including K.'s paternal grandparents, to say that Appellant was a truthful person and/or to explain that they never saw Appellant interact inappropriately with either K. or A. Accordingly, the court did not abuse its discretion in allowing the

[9] Appellant's argument analogizing the prosecutor's cross-examination of Appellant to an improper golden rule argument is also without merit. A golden rule argument occurs when "an arguing attorney asks the jury to place themselves in the shoes of the victim." *Juliano v. State*, 166 Md. App. 531, 547 (2006). Appellant does not point to any authority, and we are aware of none, applying the concept of a golden rule argument made to the jury to a question posed to a witness during cross-examination.

prosecutor to attack Appellant's credibility by asking him, albeit facetiously, why K. would possibly have fabricated the story.

## CONCLUSION

The court did not abuse its discretion in precluding defense counsel from asking K. about her prior sexual conduct, or in allowing A. to explain reasons to use a photo vault application. The claims of error regarding the testimony of Detective Jeunette and the cross-examination of Appellant were not preserved for appellate review and were also without merit. Accordingly, we shall affirm the judgments of the circuit court.

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

Circuit Court for Baltimore County
Case No. 03-K-17-003207

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 51

September Term, 2019

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KENNETH ALBERT WARTMAN, III

v.

STATE OF MARYLAND

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Graeff,
Reed,
Gould,

JJ.

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Concurring Opinion by Gould, J.

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Filed: August 17, 2020

I agree with the decision to affirm Mr. Wartman's convictions. I write separately to express my disagreement with the analysis of the admissibility of Detective Jeunette's testimony about Appellant's social media search history.

First, I would not find a waiver of Appellant's objection to the testimony. The first question in the colloquy was: "Now, when you receive that search history, why was that entire history of the searches significant?" If we ignore what we now know only with the benefit of hindsight, that question does not inherently solicit an objectionable lay opinion. Defense counsel could have reasonably interpreted that question as asking the detective *why* one would want to see a search history during an investigation of this nature. Such a question is not, on its face, designed to elicit a lay opinion. I don't see a waiver in the fact that defense counsel did not object before the detective responded.

After the detective answered the question stating "[w]ell, it shows guilt of conscious [sic] to me," the prosecutor followed up with the one-word question "[w]hy?" At that point, in the middle of the detective's answer, defense counsel interrupted with this objection: "Objection, Your Honor. I would move to strike all of that as improper opinion." In my view, this objection allowed the trial court, in "real time," to strike the detective's answer to the first question as well as the partial answer to the follow-up question, and to give a curative instruction if necessary. *See Prince v. State,* 216 Md. App. 178, 194(2014).

Turning to the merits, Detective Jeunette's testimony revealed no basis from which he could form and express an opinion on what Appellant's apparent increase in

his social media searches revealed about his state of mind. The State argues that the detective's "testimony that Wartman's search history showed that he missed being with the girls was properly admitted because it was based on his experience as an officer specializing in child sexual abuse investigations." However, lay opinions must be "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. The Court of Appeals has made it clear that "Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Ragland v. State*, 385 Md. 706, 725 (2005). As such, Detective Jeunette's testimony, which was not based on the perception of the witness but instead relied upon his specialized knowledge, experience, and training, was lay opinion that should not have been admitted.

Nevertheless, for the reasons stated by the majority, I believe that any error in admitting Detective Jeunette's testimony was harmless. As such, I agree with the Court's decision to affirm Appellant's convictions.