Circuit Court for Montgomery County
Criminal No. 128908C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 930

September Term, 2017

FRANCISCO FERNANDO FIGUEROA

v.

STATE OF MARYLAND

Wright,
Kehoe,
Reed,

JJ.

Opinion by Reed, J.

Filed: October 16, 2019

A jury in the Circuit Court for Montgomery County convicted Francisco Fernando Figueroa, the appellant, of sexually abusing K., who considered him her stepfather. At trial in November 2016, the victim, then age eighteen, recounted sexual encounters that had occurred between the ages of ten and fourteen. She first disclosed the abuse eighteen months earlier, via an anonymous social media post, portions of which were admitted into evidence as State's Exhibit #3. Nearly four months later, after she left the appellant's household, K. reported the abuse to her high school counselor, whose report to child protection authorities prompted a criminal investigation.

The appellant denied any sexual contact with K., claiming that she fabricated her accusations in the aftermath of family discord and a disciplinary ultimatum stemming from her misbehavior at home and at school. In discovery and at trial, the appellant sought access to her school and mental health records, as we shall detail below.

The jury convicted the appellant on all twelve counts of sexual abuse, which corresponded to K.'s testimony that the abuse began while she was in fifth grade, when the family lived in an Olney apartment, then continued after they moved in January 2010 to a house in Aspen Hill, until her fourteenth birthday in February 2012. The appellant was convicted and sentenced as follows:

- Count 1 (sex abuse of a minor by a household family member, between Jan. 1, 2008, and Feb. 23, 2012): 25 years

- Count 2 (third degree sex offense, first act between Jan. 1, 2008, and Jan. 26, 2010): 2 years, to run consecutively

- Count 3 (third degree sex offense, last act between Jan. 1, 2008, and Jan. 26, 2010): 2 years, to run consecutively

- Count 4 (second degree sex offense – anal intercourse, between Jan. 27, 2010, and Feb. 23, 2012): 10 years, to run consecutively

- Count 5 (second degree sex offense – fellatio, first act between Jan. 27, 2010, and Feb. 23, 2012): 10 years, suspended, to run consecutively

- Count 6 (second degree sex offense – fellatio, last act between Jan. 27, 2010, and Feb. 23, 2012): 10 years, suspended, to run consecutively

- Count 7 (second degree sex offense – cunnilingus, first act between Jan. 27, 2010, and Feb. 23, 2012): 10 years, suspended, to run consecutively

- Count 8 (second degree sex offense – cunnilingus, last act between Jan. 27, 2010, and Feb. 23, 2012): 10 years, suspended, to run consecutively

- Count 9 (third degree sex offense – digital penetration of vagina, first act between Jan. 27, 2010, and Feb. 23, 2012): 2 years, suspended, to run consecutively

- Count 10 (third degree sex offense – digital penetration of vagina, last act between Jan. 27, 2010, and Feb. 23, 2012): 2 years, suspended, to run consecutively

- Count 11 (third degree sex offense – digital penetration of anus, first act between Jan. 27, 2010, and Feb. 23, 2012): 2 years, suspended, to run consecutively

- Count 12 (third degree sex offense – digital penetration of anus, last act between Jan. 27, 2010, and Feb. 23, 2012): 2 years, suspended, to run consecutively

The total executed time of these sentences amounts to thirty-nine years.

The appellant challenges these convictions, presenting the following three questions:

1. Did the court below err by denying Appellant full access to the educational records and mental health records of the complaining witness?

2. Did the trial circuit court err or abuse its discretion by allowing the prosecution to introduce evidence contained in State's Exhibit #3?

3. Did the trial court impermissibly restrict cross-examination of the complaining witness?

(Ant.2)

For the reasons that follow, we conclude there was no error or abuse of discretion and therefore affirm the appellant's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant was tried over eight days, from November 1-15, 2016. Because the appellant does not contend that the evidence was insufficient to support his convictions, our summary of the lengthy trial record provides context for our resolution of the issues addressed in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

The Family Background

At age five, K emigrated from Brazil, joining her mother and biological brother in Maryland. When K. was seven, the appellant and K.'s mother began a relationship. The couple had a son together. The family lived in an Olney apartment while K. was in third, fourth, and fifth grades.

In 2008, when K. was ten years old and in fifth grade, two boys from the appellant's prior relationship emigrated from Guatemala. The growing household prompted a move to a house in Aspen Hill, where the family remained for K.'s middle and high school years.

In August 2015, K.'s mother and the appellant had a second son together. K. considered them all her family and loved them.

At trial, K. testified that even though the appellant was not married to her mother, she called him her stepfather. K. felt close to the appellant into middle school because he was attentive and loving. She trusted him, confided in him, and described him as her "best friend" during those years.

The Abuse

K. testified that it was during this period that the appellant had sexual contact with her. Beginning at age ten, when K. was in fifth grade, the appellant engaged in sexual activities with her. She referred to these encounters as when she "pleased him sexually" as "play." She cooperated because she wanted to please him. As long as she "made him happy" by performing sexual acts, the appellant treated her lovingly and bought her clothes and gifts. She recalled that by the time she was in eighth grade, the appellant "talked about how he can pay for college, and he can get me a new car, get me whatever I want[.]"

The appellant told K. not to tell anyone about their "secret" because he would get in trouble. Once, when one of her aunts asked her if the appellant had "ever touched" her, she answered "no" because she did not want to cause him trouble. She told the appellant about her aunt's inquiry because she trusted him and thought he should know about it.

Although K. did not remember all of their sexual encounters, she recounted several specific ones that formed the basis for the twelve counts set forth above. The sexual acts included fellatio, cunnilingus, digital penetration of her vagina and anus, and anal

intercourse. According to K., the appellant frequently watched pornography on his laptop, and she learned about these sexual acts by viewing it with him. Most of their encounters occurred in the appellant's bed, when the residence was not occupied by anyone else or only other children were present in the household. When asked how frequently the encounters occurred while she lived in Aspen Hill, K. testified that it was "[m]ore than once a month."

Although K. could not give dates for any of the incidents, she described specific sexual encounters and identified the residence where each occurred. The earliest encounter she remembered was when she was about ten years old, while the family was living in the Olney apartment. K. was in the appellant's bed, where he was watching pornography while her baby brother was in his crib, still too young to stand. K. touched the appellant's erect penis and performed fellatio.

This type of encounter "didn't just happen once." K. testified that their sexual encounters initially involved fellatio and fondling, then progressed to cunnilingus, digital penetration of her vagina and anus, and one instance of anal intercourse. K. refused the appellant's repeated requests to "take" her virginity because she did not want to "lose it" "that way." Yet she continued to engage in sex acts with the appellant because she wanted to keep him happy, he made her feel loved, and he bought her clothes and gifts.

K. recalled another encounter that occurred when she and her two younger brothers wanted to play with the hose outside their Aspen Hill home. Seeking the appellant's permission for that "water-wasting" activity, K. offered to perform fellatio and then did so.

She also remembered one morning during seventh grade when the appellant asked for fellatio and made her late for school.

Another encounter occurred when K. was in eighth grade, in her stepbrother's room at their Aspen Hill residence. For weeks, the appellant had been asking for anal intercourse, and she agreed to try. After inserting the appellant's penis, however, she stopped him because it hurt. She also stopped him when he inserted his finger in her anus, because that hurt as well.

By seventh grade, K. understood that her sexual encounters with the appellant were wrong and was reluctant to continue. Although she would agree when he asked to "play," she often did not follow through by making herself available to him. By her fourteenth birthday, in February 2012 during her eighth grade year, their sexual encounters had ceased.

The Estrangement

As their sexual contact ended, the relationship between K. and the appellant deteriorated to the point that the appellant stopped speaking to her – at times for weeks or months. In a letter dated April 25, 2012, K. expressed her distress and affection for the appellant, as follows:

> Dear Dad (Fernando),
>
> > Yes, I know we fight <u>ALL</u> the time & there will never be a "last" fight because I'm sure there will be many more, but I don't wanna fight & wait 5 months to make up because it's just doesn't feel good, because . . . . . believe it or not, you are my friend. I see you more as friend, then a father don't take that in a wrong way because it's good cause I tell you stuff when I need to express myself or need someone to tell but at the same time not good cause

> we joke around & sometimes it ends up going to far so we yell & fight & at the end I always regret it, because we don't talk for months & I DON'T LIKE IT AT ALL. It might look like it doesn't bother me that we don't talk but deep down inside I'm crying & dying & wishing it wasn't like this because I really do honestly Love You . . . no matter what you have to say because you are the only man in this world I see as my father & I just want you to know I'm not lying to you about it I just don't know how to show it to you but you tell me & I'll do it because I love you. & I'll tell you 1 million times more & I want to say sorry for what I did & yelling at you in the car even if it was months ago, and I hope we don't fight anymore even though I know we will, but not take so long to apologize. & I just yelled at you because I don't like it when people say bad things about me and I get defensive about it cause I know it's true & again I'm sorry. I'm sorry. I'm sorry, I'm sorry, I'm sorry, I'm sorry & 1 million times more and I really hope you can Forgive Me because I would be very grateful if you did honestly, because I can't do it anymore come home & not talking to you because I miss it I have always trusted you more than my mom & your honestly the only one I go to talk about how I'm feeling because you listen & don't judge & yell like my mom and I just want to start out with baby steps and if you can please forgive me again I would be really grateful [] And if you don't forgive me I'll understand too.
>
> Sincerely, [K.]
>
> P.S. Happy Birthday. Nobody told me I remembered since morning since yesterday [] I didn't forget…….

Their estrangement continued into high school. At the appellant's behest, K. was excluded from family activities like breakfasts and an amusement park trip. The appellant "bad mouthed" K. to her mother, who typically sided with the appellant.

K. testified that by the time she was in high school, she became depressed, had a bad "attitude," and missed a lot of school. Her grades suffered, dropping from A's to C's in middle school, then becoming "horrible" in high school. During her second and third

years of high school,[1] she expressed suicidal thoughts and was referred for crisis counseling. Although she eventually received medication and therapy, during which she cited her lack of friends and her poor relationship with her stepfather as factors in her distress, she did not divulge any of the sexual abuse because she felt guilty and feared the consequences. In particular, she worried about how her mother would respond and how the family would survive without the appellant's financial support.

The Disclosure

In May 2015, K. broke her foot when she jumped out her window in order to meet up with a boyfriend. She lied to her mother and the doctor, saying that the injury occurred when she jumped from the stairs in their home.

While K. was recuperating, the appellant and K.'s mother told her that if she did not start going to school regularly, then she would have to get a job and pay rent. K. was angry about this ultimatum, feeling like she was being treated differently that her stepbrother who never paid rent. Later that day, she vented to her biological brother about the appellant, saying that she "could ruin his life by saying one thing," but she did not explain what she meant. By that time, however, she had "already talked about [the abuse] with somebody," via an anonymous online post at ask.fm.com and with her best friend, A.S.

K. responded to the ultimatum by leaving home, staying first with a friend and then seeking to stay with another family member. Although she returned home after a few

[1] After K. repeated the tenth grade (sophomore year), she skipped eleventh (junior year) and started twelfth grade (senior year) on time, as a seventeen-year-old, then graduated at eighteen.

weeks, she left again before her mother gave birth to the appellant's youngest son, on August 14, 2015. The appellant called K. "selfish," changed the door locks, and would not allow her back into the house. K. went to live with a friend's family.

When K.'s high school called to report that she was absent on the first day of her senior year, the appellant and K.'s mother called police and filed a missing person report. K. went to school the next day, on September 1, 2015. The school counselor brought K. into her office and called K.'s mother in as well. The counselor questioned K. about why she did not want to return home and more specifically about her relationship with the appellant. In her mother's presence, K. cried and nodded her head affirmatively when the counselor asked whether her stepfather had touched her. Eventually, K. acknowledged that the appellant also "made her touch him" inappropriately.

The Investigation

The school counselor, who is a mandatory reporter of child abuse, immediately called Child Protective Services, which dispatched a Special Victims Unit team. Responding police officers interviewed K., who was distraught and had difficulty talking about the abuse. Ultimately, she recalled the early incident when her baby brother was in his crib and provided enough information to prompt further investigation.

Police interviewed K. again on September 21 and November 5, 2015. When asked on September 21 whether she ever told anyone about the abuse, K. answered that she first told someone in an anonymous post on a social media website called ask.fm.com. In the presence of officers, she logged onto that website from a police computer and "pull[ed]

up" her post from May 12, 2015, which the officers viewed and printed out. Because the posting date shown on the screen did not appear on the printed page, the detective copied by hand the date and time for each post onto the print-out. Over defense objection, that document was admitted into evidence as State's Exhibit #3. K. explained that shortly after making this post, she followed advice received in response to it to confide in someone, by telling both a friend and her then-boyfriend that the appellant had sexually abused her. She did not plan to say anything to anyone else because she "didn't want to cause . . . problems with the family."

After K. reported the abuse to her school counselor and police officers, she returned to her family residence, while the appellant stayed with K.'s maternal aunt. K. continued to struggle with school and family relationships. Her mother, maternal grandmother, and other family members made her feel unwelcome and blamed her for the appellant's absence. After suffering continued depression, suicidal thoughts, an overdose of acetaminophen, and two mental health hospitalizations, K. was removed from her family home and placed in a foster home on Christmas Eve 2015.

Over the ensuing months, K. attended school and therapy regularly, significantly improved her grades, graduated from high school, and enrolled in community college. But K. had few interactions with her relatives and felt she had lost her family.

The Defense

The appellant denied any sexual contact with K. According to the appellant, K. has had "daddy issues" after her biological father remained in Brazil and maintained little contact with her. Testifying in his defense, the appellant disputed that their relationship had ever been affectionate or close; instead, he claimed that K. rejected him as a parent and sought to "drive a wedge" between him and her mother by repeatedly telling him that she was cheating on him. In the appellant's view, K.'s accusations were the culmination of her threat to "ruin" his life in retaliation for his role in requiring her to attend school or get a job and pay rent.

We shall add pertinent facts in our discussion of the issues raised by the appellant.

DISCUSSION

I. EDUCATIONAL AND MENTAL HEALTH RECORDS

The appellant contends that the trial court "erred by denying [him] full acc[e]ss to the educational records and mental health records of the complaining witness." He specifically challenges the rulings, made after motion hearings on September 9 and October 25, 2016, prohibiting access to some of K.'s school grades and to all of her mental health records. We consider each type of record in turn, explaining why the court did not err or abuse its discretion in restricting access.

A. Educational Records

1. Standards Governing Disclosure

Under Maryland law, educational records generally are "confidential but not privileged," so that they may be subject to pretrial discovery under Md. Rule 4-264, requiring a motion and court order. *See Goldsmith v. State*, 337 Md. 112, 122-23 (1995); *Zaal v. State*, 326 Md. 54, 76 (1992). Under that rule,

> [o]n motion of a party, the circuit court may order the issuance of a subpoena commanding a person to produce for inspection and copying at a specified time and place before trial designated documents . . . or other tangible things, not privileged, which may constitute or contain evidence relevant to the action.

Md. Rule 4-264.

When considering access to confidential records, courts must balance the competing interests of the subject's right to confidentiality against a criminal defendant's right to a fair trial. *See Zaal*, 326 Md. at 87. It is the defendant's threshold burden to demonstrate his "need to inspect" such confidential records by establishing a "'reasonable possibility that review of the records would result in discovery of usable evidence.'" *Fields*, 432 Md. at 667 (citing *Zaal*, 326 Md. at 81). "The sufficiency of the need to inspect depends upon factors such as the nature of the charges brought against the defendant, the issue before the court, and the relationship between the charges, the information sought, and the likelihood that relevant information will be obtained as a result of reviewing the records." *Id*. (citation and internal quotation marks omitted; punctuation altered).

The leading case applying these principles to school records is *Zaal*, in which the defendant, who was charged with sexually abusing his minor granddaughter, filed a pretrial subpoena seeking access to the child's school records. *See Zaal*, 326 Md. at 61-62. When the school board sought a protective order, the circuit court conducted a hearing, reviewed the records *in camera*, and then quashed the subpoena based on its review. *Id*. at 62-63.

The Court of Appeals reversed. *Id*. at 61. Weighing the student's privacy interests in nondisclosure against the defendant's need to review information potentially relevant to his defense, the *Zaal* Court held that a criminal defendant bears the burden of persuading the court that "the 'need to inspect' threshold has been crossed[.]" *Id*. at 87. Because the motion court applied the wrong test, the Court remanded for a determination of whether the school records were relevant, *i.e.*, whether they contained material that was either admissible at trial or relevant for impeachment purposes, "or which would lead to such evidence." *Id*. at 88. *Cf. Fields v. State*, 432 Md. 650, 672 (2013) (motion court "committed legal error by failing to adhere to protocol set forth in *Zaal*").

In this case, the motion court concluded that the appellant established a need for access to only some of K.'s educational records. For the reasons that follow, we are satisfied that the court applied the correct legal standard and that the record supports its ruling.

2. The Motion Record

At a motion hearing on September 9, 2016, defense counsel sought an order directing the Montgomery County Public Schools ("MCPS") to disclose "the entire file"

of K.'s school records. Noting that K.'s mother had been denied such access, defense counsel proffered that he expected K.'s school records to include information about her allegations against the appellant:

> [T]o get very specific in terms of what we're looking for in this case is we're looking at an indictment that alleges dates between 2008 and 2012 for when these incidents allegedly occurred. I know from discovery in this matter that the initial disclosure . . . about what happened was made to a school counselor. I assume and I'm probably correct that the counselor had made notes of those communications, the details that were disclosed during the course of that conversation or conversations with [K.], . . and reports that were made, and I know that because that's what they're required to do under the law. So we are interested in getting those records. I would also indicate that there should be some information in there, and I can't believe that it wouldn't be in there, and this is not speculation, specific questions as to when did it happen, how often did it happen[.]

The motion court expressed concern about the "blanket" nature of the defense request, pointing out that it encompassed far more than any "readily identifiable" "disclosure report" pertaining to K.'s report of sexual abuse. When the court asked, "what are the other issues?[,]" defense counsel answered that he wanted to "actually see[] the report" regarding the disclosure and "what subsequent actions were taken[,]" as well as K.'s "base record," which "would contain grades[,]" because

> if this is going on between the years of 2008 and 2012, there certainly would be information in there in terms of grades, change in performance. Attendance records I think are extremely critical. I believe in the year where there was this disclosure of these alleged incidents, I believe there was a period of what my investigation reveals from talking to the parents, there may have been as many as 60 days' worth of school that was missed.

Defense counsel then asked the motion court "to take a look at these records." When the court pointed out that the Court of Appeals "also talks about not conducting a fishing expedition[,]" defense counsel argued that because "this is a credibility case[,]" the issue of whether K. had "problems in school is very significant in this case." These school records would help him "do [his] job to get to the bottom line when this case comes to trial to effectively cross-examine[.]" Counsel complained that "the Courts of Appeal again have set up these roadblocks to protect the victim, but I think they've sort of diminished the rights of the defendant to defend in a case like this[.]"

In response, counsel for MCPS advised that K.'s mother had been denied access to her school records because her request was made after K. turned eighteen in February 2016, so that federal and Maryland law prohibits disclosure without K.'s consent. *See Zaal*, 326 Md. at 64, 68-76 (reviewing federal and Maryland restrictions on disclosure of educational records). With respect to records concerning K.'s report of sexual abuse to her school counselor, MCPS counsel explained:

> The process that Montgomery County Public Schools requires of all its employees is if they become aware of suspected child abuse or child neglect, they are to make a report, and I believe it is actually within 24 hours or so, and follow-up within 48 hours be completing a form that Montgomery County Public Schools have. . . . Copies of that form go to the[] State's Attorney's Office. They go obviously to Child Protective Services. A copy does not go in the child's records. A copy is not kept at the school. . . . [F]urthermore . . . the school employees are informed and trained that it is not their job to determine whether there is factual support or evidence for what may be alleged. That's up to the professionals.

When the court asked whether "there's nothing in the school records that would pertain to the initial disclosure to the school counselor[,]" MCPS counsel proffered that K.'s record did not mention the disclosure:

> I will tell you that as in previous cases I have obtained the records. I have reviewed the records. There is no reference at all to the report to Child Protective Services. . . .
>
> [L]ay people may think that if something happened at school there must be a record, a written record created by school officials, and that isn't the case. Student records are required to be created according to requirements dictated by the Maryland State Department of Education. In fact, there is a student records manual that the State Department of Education issues every couple of years, and so there are certain records that must be kept, family information, the academic records, the standardized testing scores, health records which . . . consist of screenings, immunizations, visits to the health room.
>
> Those are all spelled out in the student records manual. It doesn't mean that a counselor will create a record from a counseling session. I hate to say this, but I suppose a counselor needs to be asked . . . if she made any notes, but there certainly are no notes that became part of the child's record, and again the child's folder then follows the child from elementary school to middle school to high school as they matriculate through different levels. So, again, as I previously mentioned, I do have the, the school records here today. I have reviewed them. I can point out to the Court that, a couple of things. . . . I can represent[to] the Court that . . . there is no . . . disciplinary file for this child.
>
> Furthermore, I would urge the Court to consider . . . that the more specific the information being sought, the less the need for the defendant to have direct access to that information, meaning that if we're looking to see is there anything about alleged child abuse or sex abuse by anyone, by this defendant or by anybody else, an impartial reviewer of the file, of the paperwork, can determine is there anything here that is reporting such an incident . . . . [T]he file consists of routine educational records.

With respect to attendance and grade records, counsel for MCPS advised that the records do not show which specific day that a student missed, because "only the cumulative totals are kept" once a school year ends. The court acknowledged that such attendance records "could be relevant or lead to the discovery of relevant evidence" but questioned how "the grades would be relevant." Defense counsel answered that "if something is going on in [a] child's life, . . . it's fair to say their grades may be impacted by that," then pointed to the "relevant time period from 2008 to 2012," when the abuse was allegedly occurring. The court agreed, and counsel for MCPS responded that he would disclose attendance and grade records for that time period.

Shortly after that hearing, defense counsel moved for reconsideration, seeking access to additional attendance and grading records, beyond 2012, "to the present." At a second motions hearing on October 25, 2016, defense counsel proffered that such additional records could be relevant because

> a couple of years before the reporting [on September 1, 2015], there were issues with her attendance at school, which were causing conflicts at home, which we would allege essentially led to her coming forward with these complaints, and were part of the motivation for these complaints.

Although counsel did not want to disclose the appellant's defense strategy, he proffered, "as an officer of the court," that K.'s records through her 2016 graduation would be "relevant, and it may very well be part of [his] cross-examination of the young lady as well."

Based on that additional information, the court agreed that attendance records could be relevant through the date of K.'s disclosure, September 1, 2015. Counsel for MCPS then explained that

> the records in the file are accumulative report cards for each . . . of the school years, and the . . . accumulative attendance is shown by quarter for that school year on the report card. So, there isn't a separate attendance record apart from the report card. . . .
>
> [I]t's all on one 8 and a half by 11 sheet of paper, so if the Court wants me to redact anything –

Defense counsel responded that he wanted access to both grades and attendance, proffering that K.'s "grades were declining because she wasn't attending school." After extending access to K.'s attendance records, by requiring disclosure of records from 2013 through September 1, 2015, the court was not persuaded that the appellant established a concomitant need to inspect K.'s grades for that period. The court ordered counsel for MCPS to redact her grades after the 2012 report.

3. The Appellant's Challenge

Citing *Zaal*, the appellant argues that the trial court erred in denying access to K.'s school records without affording defense counsel an opportunity to review all of those records *in camera*. We disagree and explain.

After accepting the proffers by counsel for MCPS that K.'s records did not include any mention of her sexual abuse report, defense counsel limited his request to K.'s attendance and grade records, from 2008 when the abuse allegedly began, through September 1, 2015, when she reported it to her school counselor. When the motion court

asked, "what's the basis for the grades" disclosure, defense counsel proffered that K.'s "grades were declining because she wasn't attending school" and "guess[ed]" that "the State's going to argue that part of her behavior." Defense counsel sought to challenge the State's likely inference that it was the sexual abuse that caused her declining attendance and grades, by asking the jury to draw the counter-inference that it was K.'s declining attendance and grades that caused the family strife and led to the ultimatum that prompted K. to falsely accuse the appellant.

The court granted that request in part, ordering MCPS to disclose K.'s attendance records for that period but limiting access to her grade records to the period of the alleged abuse, i.e., 2008-2012. Accordingly, the appellant received all the school records he sought except for K.'s grade reports from 2013 through September 1, 2015.

We are not persuaded that the court abused its discretion in ruling that the appellant failed to establish a need to inspect those grade reports. The requested but undisclosed grade records covered K.'s grades after the abuse ended, for the second semester of her first year of high school (2013) as well as her second and third years (2014 to September 1, 2015). Given the disclosure of all K.'s attendance records for that period, the appellant's defense was not hampered by lack of access to K.'s grades. Indeed, defense counsel did not renew his request for them at trial, where it was undisputed that K. struggled with her grades from middle school through the date she disclosed the abuse to her school counselor. Because that information was easily elicited before trial from the appellant and K.'s mother, and established at trial through K. herself and her high school counselor, we cannot

say the trial court abused its discretion in determining that the appellant did not establish a need to inspect the undisclosed grade records in order to prepare or present the appellant's defense.

B. Mental Health Records

Maryland law establishes a qualified privilege for mental health records. Under section 9-109(b) of the Courts and Judicial Proceedings Article, "in all judicial . . . proceedings, a patient or the patient's authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing . . . [c]ommunications relating to diagnosis or treatment of the patient[,]" as well as "[a]ny information that by its nature would show the existence of a medical record of the diagnosis or treatment." The appellant contends that the trial court erred in protecting this statutory privilege by denying his request for access to K.'s mental health records. We disagree.

1. Standards Governing Disclosure

The Court of Appeals upheld limitations on access to mental health records for minor victims of sexual abuse in both *State v. Johnson*, 440 Md. 228 (2014), and *Goldsmith v. State*, 337 Md. 112 (1995). Each case

> involve[d] a "tug of war" between the right of the victim to assert his or her privilege to prevent disclosure of confidential mental health records and the right of a criminal defendant to present a fair defense at trial. *See* U.S. Const. amend.VI; Md. Decl. of Rts. Art. 21. Specifically, a criminal defendant has a "right to put before a jury evidence that might influence the determination of guilt," or, in other words, a right to obtain and present exculpatory evidence. In addition, the Sixth Amendment provides the criminal defendant with the right to confront witnesses, which is achieved through cross-examination.

Johnson, 440 Md. at 238-39 (case citations omitted).

In *Johnson*, the Court affirmed the rule previously announced in *Goldsmith*, "that a criminal defendant is never entitled to pre-trial discovery of a victim's privileged mental health records (absent waiver by the privilege holder)." *Id*. at 240. The same bar does not apply at trial, however, if the defendant establishes by proffer that the privileged mental health records are reasonably likely "to contain exculpatory material for a proper defense." *See Johnson*, 440 Md. at 240; *Goldsmith*, 337 Md. at 133-34. Thus, at trial, "a criminal defendant is entitled to an *in camera* review of a victim's mental health records, even though privileged, if the defendant can establish a reasonable likelihood that the privileged records contain exculpatory evidence relevant to the defense." *Johnson*, 440 Md. at 231-32.

Acknowledging the difficulty of satisfying this proffer standard without access to the mental health records themselves, the Court of Appeals cited instructive examples of how that burden has been met:

> We recognize how unlikely it may be that a defendant or defense counsel will know in advance what information is in a patient's privileged mental health or psychotherapy records. Nonetheless, **in order to gain access to any information in those records, the defendant may (and must) be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information.** We look to our sister states for examples of facts that could reveal a likelihood that the privileged records contain exculpatory evidence. One such example is evidence of prior inconsistent statements. In *State v. Peseti*, the victim's sister testified that the victim had on one occasion "admitted that the incident 'didn't happen.'" 101 Hawai'i 172, 65 P.3d 119, 129. Similarly, in *Brooks v. State*, 33 So. 3d 1262, 1269 (Ala. Crim. App. 2007), other records produced by the State during discovery included an inconsistent statement by the victim. Another example is strange behavior by the victim

> surrounding the counseling sessions, such as *Burns v. State*, 968 A.2d 1012 (Del. 2009), where the victim destroyed notes about alleged abuses after an interview with her psychiatrist. *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557 (1994), a case cited by this Court in *Goldsmith*, also provides a useful example of a defendant pointing to actual facts to support a proffer that the mental health records likely contained exculpatory evidence. In that case, the defense's theory was "that the claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation." In support of a request to review the claimant's mental health records, the defendant pointed to prior abuse of claimant by her biological father and factual support for sexually aggressive behavior by the victim. Although the trial court denied the defendant's request, the Supreme Court of Michigan held, based on defendant's proffer, that in camera review "may have been proper" and remanded for further proceedings, including to further develop the record. 521 N.W.2d at 576–77.

Id. at 252-53.

2. The Appellant's Challenge

The appellant tacitly acknowledges that the trial court properly applied Crim. § 9-109, following *Goldsmith* and *Johnson,* in denying his initial request for pretrial discovery of K.'s mental health records. Instead, the appellant renews his complaint that "the threshold showing required by *Johnson v. State* is an impossible one to meet," then argues that the court "arguably, misapplied" *Johnson's* proffer standard in denying his request for *in camera* review of those records during trial.

In this Court, the appellant relies on the following proffer, made by defense counsel at the October 25, 2016, motion hearing:

> I would suggest to the court that if [K.] is going to these mental health providers, or if she's going to Tree House[2] and speaking to Dr. Shukat, and

[2] The Tree House is an assessment and treatment center in Montgomery County, "dedicated to reducing trauma and promoting healing for child victims of physical abuse, sexual abuse, and neglect." *See* http://treehousemd.org (last viewed May 31, 2018).

> specially her mental health providers about whether or not anything happened or if she's strictly talking about her depression, which I have information about, her adjustment disorder, which I have information about. She went at one point to a facility . . . in Hagerstown . . . . [I]f she went long before she ever made this complaint, and if there is information in there, where she doesn't disclose that any of this happened.

In the appellant's view, defense counsel "was trying to establish a negative by making a proffer that the *absence* of a disclosure of sexual abuse during the periods of mental health treatment was significant to the defense." "In light of the interview of the complaining witness by the police detectives – establishing that the complaining witness had great difficulty providing details of the alleged sexual acts – Appellant maintains that the trial judge erred by ruling that defense counsel's proffer regarding an absence of complaints while in treatment was inadequate."

The State counters that "[e]ven assuming that the absence of specifics can be considered exculpatory," the appellant "is not entitled to an abrogation of the victim's privilege in her mental health records where he cannot point to a single fact giving rise to an inference that the victim failed to disclose specific instances of abuse during her therapy sessions." With respect to the proffer standard established in *Johnson*, the State points out that the

> burden is necessarily high but not impossibly so because a lesser burden would eviscerate the victim's privilege. [The appellant's] proffer amounted to nothing more than a fishing expedition and the court properly exercised its discretion when in denied [his] request.

As the appellant tacitly acknowledges, K.'s mental health records were absolutely privileged before trial. *See Johnson*, 440 Md. at 240. In determining whether they were subject to disclosure at trial, the court applied the correct legal standard when it required the appellant to proffer facts outside the records themselves to establish a reasonable likelihood that they contained exculpatory information. Our task, therefore, is to determine whether the court abused its discretion in ruling that the appellant failed to do so.

At trial, the sole justification proffered for obtaining access to K.'s mental health records was that they would support the appellant's claim that K.'s accusation was not credible, by showing that she did not disclose to her mental health providers specific details concerning the abuse. Even assuming that the *absence* of specific information regarding acts of child sexual abuse in a mental health record may be considered exculpatory under a particular set of circumstances, nevertheless, the only extrinsic fact proffered by defense counsel to establish a reasonable likelihood that K.'s mental health records did not contain such details was that during her initial interview with police on September 1, 2015, the distraught seventeen-year-old had difficulty in relating, to police officers whom she had never met, more specific information regarding sexual encounters she had with her step-father at least three and a half years earlier.

The appellant's proffer was a fishing expedition in search of privileged information from K.'s mental health records. We find proffers in comparable cases instructive here. In *Goldsmith*, 337 Md. at 118, the proffer by defense counsel that he "simply [did not] know what [the victim's] emotional state is," ten years after she was sexually abused, did not

warrant *in camera* review of her mental health records. Similarly, in *Fisher v. State*, 128 Md. App. 79, 128 (1999), *rev'd in part on other grounds*, 367 Md. 218 (2001), the defense proffer that "[w]e have no way of knowing, without having access to those records, whether there is exculpatory material or not," did "not do it." Likewise in *Johnson*, 440 Md. at 251, defense counsel's proffer that he would like to know the victim's "mental health diagnosis," symptoms, and "propensity for veracity," was a "fishing expedition" that was "not enough to overcome the victim's privilege in his mental health records."

Here, as in those cases, the trial court did not abuse its discretion in determining that the appellant's proffer "did not cut it," falling short of establishing a "reasonable likelihood" that K.'s mental health records contained an exculpatory lack of detail regarding the abuse. *See Johnson*, 440 Md. at 248. The fact that K. initially had difficulty in detailing the specific acts of sexual abuse to police officers, none of whom were mental health providers, does not establish a reasonable likelihood that she failed to disclose specifics about the abuse to her mental health providers, resulting in mental health records containing an exculpatory lack of detail. Appellant's proffer rests on the false premise that a victim of past child sexual abuse should be ready, willing, and able, on the same day she discloses the abuse to an adult for the first time, to catalogue specific incidents with supporting detail, and to do so to police officers whom she has never met. Not surprisingly, that premise and proffer was undercut by the undisputed evidence that K. related such specific details on later occasions, including during her police interviews on September 21

and November 5, 2015. On this record, the trial court did not err or abuse its discretion in denying *in camera* review of K.'s mental health records during trial.

II. STATE'S EXHIBIT #3

The appellant next contends that "the trial court erred or abused discretion by allowing the prosecutor to introduce evidence contained in State's Exhibit #3." That exhibit is a fifteen-page document that was printed from an Internet website known as ask.fm.com, showing a series of anonymous messages posted on the "wall" of a user identified as "xoizza." At issue is one page of the exhibit with posts allegedly exchanged between xoizza (shown in italics) and K. (shown in boldface), as well as handwritten date and time stamps added by the police detective (shown in brackets) who witnessed K. access her ask.fm.com account and print out this document. We reproduce the posts exactly as written, reversing them to place the correspondence in chronological order.

> **When I was 10 years old my step father would ask me to do sexual things with him and he would bribe me to do so and I would give in and I felt wrong but when I would do these things he would treat me the way I always wanted to be treated. He would just show so much love, but when I got older I reali**
>
> *Uhm yeah no dude hope you're fucking around*
>
> [05/12/15 @ 0013:09 GMT]
>
> **… I realized how wrong this is and I would tell him to stop asking me and to stop touching me but he wouldn't listen and kept insisting. I was 13 by this time and after this he treats me so much different and it hurts and I feel so guilty and disgusting and he lives with u**
>
> *Lives with me..??? you mean with u??*
>
> [05/12/15 @ 0014:55 GMT]

I've never told anyone and this just eats at my soul

Uhm if you're not fucking around than you need to tell someone quick. I'm serious. At least tell me somewhere.. other than here

[05/12/15 @ 0015:38 GMT]

I don't want to tell anyone because I feel like me going with it makes me just feel disgusting and I just idk I don't know if I can ever tell anyone but I just need to let this out anonymously

Obviously you were very young how could you know any better if you tell me rn I promise I will do so much, but not on here

[05/12/15 @ 0017:34 GMT]

I don't want to be judged and you probably are going to think it's so weird fbecause you don't know me at all

I'll share something with you too, you could just text me you don't have to tell me who you are. I just don't want someone going through all that.

[05/12/15 @ 0020:35 GMT]

(Boldface and italics added.)

In appellant's view, this evidence was inadmissible hearsay that did not qualify for admission under Md. Rule 5-802.1(b), the hearsay exception for a prior consistent statement rebutting a claim of fabrication or improper motive. Because we agree with the trial court that defense counsel "opened the door" to such rehabilitation in his opening statement, we conclude that the trial court did not err in admitting the challenged exhibit or in permitting the State to question K. about that evidence during her direct examination. Our reasoning follows.

A. Standards Governing Admission of Rehabilitative Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Unless the out-of-court statement in question fits within an established exception to the rule against hearsay, it "is not admissible." Md. Rule 5-802. This Court determines *de novo* whether evidence qualifies for admission under one of those exceptions. *See Parker v. State*, 408 Md. 428, 436 (2009).

The hearsay exception at issue here applies to "[a] statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]" Md. Rule 5-802.1(b). The statement must be made before the alleged fabrication or improper influence or motive arose, because only "'[a] consistent statement that predates motive is square rebuttal of the charge that the testimony was contrived as a consequence of that motive.'" *Holmes v. State*, 350 Md. 412, 417, 419, 424 (1998) (quoting *Tome v. United States*, 513 U.S. 150, 158, 115 S. Ct. 696, 701 (1995)).

Although such evidence generally is not admissible to bolster the credibility of a prosecution witness who has not been impeached under cross-examination, "[a]nticipatory rehabilitation evidence may be introduced during the direct examination of a witness for the State 'if the opening statement of [the defendant's] trial counsel predicts that jurors will receive evidence that would – when presented – 'open the door' to the [rehabilitation

evidence].'" *Fulbright v. State*, 168 Md. App. 168, 184 (2006) (quoting *Hopkins v. State*, 137 Md. App. 200, 208 (2001)). Accordingly, "the State's case-in-chief may include 'rebuttal' evidence to which the defense has 'opened the door' . . . during opening statement[.]" *Johnson v. State*, 408 Md. 204, 226 (2009). The decision to admit rebuttal evidence under this rule lies within the trial court's discretion. *See Fulbright*, 168 Md. App. at 185; *Hopkins*, 137 Md. App. at 208.

B. The Record

In his opening statement, defense counsel advised the jury that K.'s mother, when delivering the ultimatum that led to K.'s departure from home,

> said to her, [K.], you got option A, and you got option B. Option A is you're going to school, and option B if you don't go to school then you're going to work, and you're going to pay rent, but you can't have it both ways. You can't do what you want. You're going to have to do something to stay.
>
> Well, this didn't go down real well with [K.]. Now, [the prosecutor] told you she was kicked out. [K.] wasn't kicked out. [She] didn't like the ultimatum. [K.] left. [K.] left, and went and stayed with a friend . . . and her family for a little bit.
>
> That didn't work out, and then [K.] went and lived with Ms. Lopez. And I think [the prosecutor] told you that she disclosed to Ms. Lopez about the abuse. Ms. Lopez doesn't tell anybody, and mind you all of this abuse, according to [the State], started in 2008, and **[K.] doesn't tell a soul.**
>
> She's close to [her biological brother]; you'll hear that from [him]. She would tell him about the broken foot and how it really happened. She was close to her Aunt [R.]. She never told her Aunt [R.]. She never told [the appellant's] mother. She never told her maternal grandmother. **She never told a soul until one day she's out of the house, she has this ultimatum either go to school or work, and she decides I'm going to get even. I'm going to get even, and I'm going to tell this story that [the appellant] abused me.**

> **And I want you to listen to the evidence in this case. She tells no one.**

(Emphasis added.)

When the State proffered this document during K.'s direct examination, defense counsel objected to it on the ground that it was hearsay. The prosecutor proffered that because these posts were made by K. before the ultimatum, they were admissible under Rule 5-802.1(b) to rebut the appellant's claim of fabrication or improper motive, *i.e.*, that K. did not "tell a soul" about the abuse until after the appellant issued the ultimatum regarding school, work, and rent. After clarifying that K. claimed that the posts were made before the ultimatum occurred, defense counsel maintained that nevertheless, this hearsay exception was not available during the State's case-in-chief, before the jury heard any evidence regarding that the appellant's "ultimatum defense." The trial court disagreed, overruling the defense objection on the ground that defense counsel's opening statement opened the door to such rehabilitation during K.'s direct examination. The defense was granted a continuing objection.

C. The Appellant's Challenge

The appellant renews his contention that defense counsel's opening remarks did not open the door to admitting Exhibit #3. We disagree.

From the outset, defense counsel made it clear that the lynchpin of the appellant's defense would be that K. falsely accused him of sexual abuse in angry retaliation for his ultimatum regarding school, work, and rent. In his opening remarks, defense counsel maintained that K.'s accusations against the appellant were not credible because she told

no one about the abuse before the appellant issued that ultimatum. The State sought to rebut that charge of fabrication or improper motive by presenting Exhibit #3 as evidence that K. posted about the abuse before that ultimatum was ever made. Because defense counsel opened the door to the use of rehabilitative evidence in the State's case, the trial court did not err or abuse its discretion in admitting that exhibit. *See Fulbright*, 168 Md. App. at 184, 208.

III. DEFENSE CROSS-EXAMINATION OF VICTIM

In his final assignment of error, the appellant contends that the trial court impermissibly restricted his cross-examination of K. In support, he cites two rulings that he maintains "were erroneous because they excluded evidence essential to the jury's assessment of the credibility of the complaining witness." For the reasons explained below, we are not persuaded that the trial court erred or abused its discretion in either instance.

A. Standards Governing Cross-Examination

The Court of Appeals has explained that,

> [i]n controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. The trial court may also restrict cross-examination based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

Peterson v. State, 444 Md. 105, 124 (2015).

B. The Trial Record

The "first instance" of error alleged by the appellant occurred when defense counsel sought to cross-examine K. about whether she had sexual intercourse with her boyfriend and whether she told her brother that she did so. When the State objected, defense counsel argued that K.'s answers would be relevant in impeaching her testimony on direct that she did not agree to engage in sexual intercourse with the appellant because she wanted to remain a virgin. Counsel further sought to impeach K. by eliciting evidence that after she made this statement to her brother, she told a medical provider that she was a virgin. Counsel argued that the inquiry was relevant impeachment of the witness's "false image" portrayal of herself as "chaste" and "prudish." Applying the rape shield statute, codified at Md. Code, section 3-319 of the Criminal Law Article ("Crim."), the trial court ruled that defense counsel could not pursue this inquiry because K.'s credibility had nothing "at all to do with whether she has a boyfriend, [or] whether she has sex with that boyfriend[.]"

In the second instance cited by the appellant, defense counsel sought to cross-examine K. about anonymous posts in which she answered questions on her ask.fm.com "wall" concerning her sexual activity "with another boy." The relevant questions (in bold) and answers (in italics) are as follows:

What's the furthest you've gone with another boy?

Uhmm far enough for me.

So what's the furthest you've gone?

Second base… I guess . . . .

What's "far enough for me" supposed to stand for?

I haven't gone very far at all forreal forreal. . . .

I found out about "second base"! Did you ever touch the dude's dick?

No, wtf that's third base stupid. Ew.

Defense counsel argued that these posts by K. were admissible under the hearsay exception for prior inconsistent statements, *see* Md. Rule 5-802.1(a), because they contradicted her abuse accusations against the appellant:

> [DEFENSE COUNSEL]: So, she has testified about, obviously, giving oral sex, fellatio, so there is on her wall over two years ago, what's the furthest you've gone with another boy, far enough for me was her answer. What's far enough for me supposed to stand for? Her answer, I haven't gone very far at all, for real, for real. One of her questions, so what's the furthest you've gone? Her answer, second base I guess. The question, I found out about second base. Did you ever touch the dude's dick? Her answer, no, WTF, that's third base, stupid. Ew. So, that's extremely relevant to what she's testified to with regard to –
>
> THE COURT: Wasn't the question with a boy?
>
> [DEFENSE COUNSEL]: It's about what's third base and what's second base and second base with regard to the questions is describing as touching a dude's dick and –
>
> THE COURT: No, but, well, okay.
>
> [DEFENSE COUNSEL]: So, the answer, she's saying, no, I've never touched a dude's dick.
>
> THE COURT: But the question was, with a boy, with how far have you gone with a boy, which to mean means a boyfriend. She's just generally talking about what she's done sexually. We have no idea who she's talking to, about, in this conversation.
>
> [PROSECUTOR]: With another boy.

[DEFENSE COUNSEL]: We don't know who the other boy is.

[PROSECUTOR]: Is what the question is.

[DEFENSE COUNSEL]: So now . . . the Court is going to deny this because the word boy was written?

[PROSECUTOR]: As opposed to man?

THE COURT: Yes. I think there's a big difference.

The court sustained the State's objection to this line of inquiry under the rape shield law, reasoning that K.'s statements, including that she had not "touched a dude's dick," related to her sexual experiences with a "boy" who was someone other than the appellant.

C. The Appellant's Challenge

In this Court, the appellant contends that "[t]hese two rulings limiting cross-examination constituted an abuse of the trial court's discretion" because the proffered evidence "should have been admissible under Section 3-319(b)(iv)" in both instances, given that "it was offered for impeachment after the State had very clearly placed the complaining witness's prior sexual contact with respect to the loss of her virginity at issue through her direct testimony."

The State responds that the appellant failed to preserve this challenge because defense counsel never argued to the trial court that the State put the victim's prior sexual conduct in issue. *See, e.g., Klauenberg v. State*, 355 Md. 528, 541 (1999) (appeal is limited to grounds raised in the trial court). Moreover, the State argues, the appellant "cannot identify where in the record the State placed the victim's prior sexual conduct in issue . . . . because it did not happen." In any event, the State continues, the trial court "properly

exercised its discretion when it precluded [the appellant] from engaging in the proposed lines of inquiry" because none of them were sufficiently relevant to overcome the bar of the rape shield law.

Even if we construe defense counsel's arguments in support of his proposed lines of inquiry broadly enough to encompass the appellate contentions before us, we conclude that the trial court did not abuse its discretion by excluding the proposed inquiries in accordance with Maryland's rape shield statute, which provides in pertinent part:

> **§ 3-319. Rape and sexual offense – Admissibility of evidence**
>
> **Reputation and opinion evidence inadmissible**
>
> (a) Evidence relating to a victim's reputation for chastity or abstinence and opinion evidence relating to a victim's chastity or abstinence may not be admitted in a prosecution for . . . .
>
> (2) the sexual abuse of a minor under § 3-602 of this title or a lesser included crime . . . .
>
> **Specific instance evidence admissibility requirements**
>
> (b) Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution described in subsection (a) of this section only if the judge finds that:
>
> (1) the evidence is relevant;
>
> (2) the evidence is material to a fact in issue in the case;
>
> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
>
> (4) the evidence:
>
> (i) is of the victim's past sexual conduct with the defendant;

> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
>
> (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or
>
> (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

Restated in terms pertinent to the appellant's challenge, the rape shield statute excludes evidence of a victim's sexual contact with someone other than the accused unless such evidence is relevant, material to an issue in the case, not substantially more prejudicial than probative, and offered either to prove a motive for false accusation or to rebut evidence of the victim's chastity. *See* Crim. § 3-319(b)(1)-(4). The appellant's attempt to elicit evidence that K. had sexual intercourse with her boyfriend was patently for a purpose prohibited by the rape shield law, *i.e.*, to impeach the alleged victim's reputation for chastity or abstinence in a prosecution for sexual abuse of a minor. *See* Crim. § 3-319(a)(2). Indeed, the appellant admits in his brief to this Court that he sought to elicit such evidence to prove that K.'s "image of chastity" was "false." That is the precisely the type of evidence that must be excluded under the statute unless it satisfies all of the prerequisites in subsection (b)(1)-(4).

We agree with the trial court that the defense proffer failed the threshold relevance test under Crim. § 3-319(b)(1). Whether K. had sexual intercourse with her boyfriend was not relevant because any consensual sexual contact that K., then age eighteen, might have had with another person did not make it any less likely that K. had sexual contact with the appellant between the ages ten and fourteen, when she was legally incapable of consenting

to such contact. *See generally* Crim. § 3-307(a)(3)-(4) ("A person may not . . . engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim" or "if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old"). *Cf. Wheeler v. State*, 88 Md. App. 512, 528 (1991) (In a rape prosecution, "[t]o assert that a person's consensual relationship with another is relevant as to whether she consented to sexual acts with appellant is ludicrous.").

Likewise, the trial court did not err or abuse its discretion in foreclosing defense counsel's inquiry about K.'s ask.fm.com posts concerning her sexual experience. Viewing the online conversation in context, the trial court reasonably concluded that K., then age seventeen, was referring to "reaching second base" with a "boy," not denying sexual contacts with her adult stepfather. That factual finding is not clearly erroneous because the language used, both by the anonymous questioner ("with another boy" and "touch the dude[]") and in K.'s answers ("far enough" and "second base… I guess"), supports the court's interpretation of K.'s statement. In turn, the trial court did not err or abuse its discretion in foreclosing that irrelevant line of questioning under the rape shield law. *See* Crim. § 3-319(b)(1).

CONCLUSION

For the foregoing reasons, we hold that the trial court did not err or abuse its discretion in restricting access to K.'s educational and mental health records, in admitting State's Exhibit #3, and in precluding cross-examination in violation of Maryland's rape shield law. We therefore affirm the appellant's convictions.

JUDGMENTS OF CONVICTION AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.