Circuit Court for Wicomico County
Case No. C-22-CR-19-000081

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1278

September Term, 2019

AUSTIN CHRISTOPHER WHITE

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Raker, Irma S.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: October 22, 2020

After a jury trial in the Circuit Court for Wicomico County, Austin Christopher White, appellant, was convicted of sexual abuse of a minor, second-degree rape, and three counts of third-degree sexual offense. For count one, sexual abuse of a minor, the court sentenced appellant to incarceration for a term of twenty-five years, with a mandatory minimum of ten years. For count four, second-degree rape, the court sentenced appellant to twenty-five years, with all but fifteen years suspended, to be served concurrent to the sentence imposed for count one. The sentence for count seven, third-degree sexual offense, was merged into count four. For count ten, third-degree sexual offense, appellant was sentenced to ten years to run consecutive to the sentences imposed for counts one and four. For count eleven, third-degree sexual offense, appellant was sentenced to ten years to run consecutive to the sentences imposed for counts one, four, and ten. This timely appeal followed.

ISSUE PRESENTED

Appellant presents the following questions for our consideration:

> I. Did the trial court err in excluding evidence that the alleged victim, who has a history of fabricating claims against her mother's romantic partners, made a similar allegation of abuse against an individual other than appellant?
>
> II. Did the trial court err in admitting hearsay that was inconsistent with the alleged victim's testimony?
>
> III. Did the sentencing court err in imposing a sentence for second-degree rape when the modality under which appellant was convicted did not exist at the time of the alleged offense.

For the reasons set forth below, we shall vacate appellant's conviction and sentence for second-degree rape, affirm the remaining convictions, vacate the remaining sentences, and remand the case to the circuit court for a new sentencing hearing.

FACTUAL BACKGROUND

This case arises from a June 2018 report that appellant sexually abused M.N., born on June 7, 2006. The alleged abuse occurred four or five years earlier, when M.N. was in the third grade and appellant was dating M.N.'s mother, Brittaney Hughes.

On July 2, 2018, a report was made to the Wicomico County Department of Social Services ("DSS") alleging the possible sexual abuse of M.N.[1] In response to that report, Katie Beran, a licensed social worker who worked in child protective services at DSS, and was assigned to the Wicomico County Child Advocacy Center ("CAC"), called M.N.'s mother, Hughes, and asked her to bring M.N. to the CAC. The following day, Hughes brought M.N. to the CAC and Beran interviewed her. That interview was video and audio recorded and played for the jury.

According to Beran, M.N. appeared "very shy," was "apprehensive," and took some time to feel comfortable. Beran used anatomical drawings to discuss body parts with M.N. during the interview. M.N. told Beran that appellant had touched her in a sexual manner. After her interview with M.N., Beran spoke with Hughes and determined that appellant had been Hughes's boyfriend and lived in the home with M.N. and some of Hughes's other children during the time the abuse occurred.

[1] The report alleging possible sexual abuse of M.N. was not made by M.N., Hughes or M.N.'s father, Michael Nolan.

Beran conducted a second recorded interview of M.N. on August 8, 2018. M.N. was brought to the CAC by her father. She "appeared more comfortable" and "opened up a little bit more and gave a little bit more information about what had gone on." The recording of the second interview was admitted in evidence and played for the jury. After that interview, Beran visited the home of M.N.'s father and step-mother and then closed the case.

On January 16, 2019, DSS received a report that M.N. had reacted to a comment made by her younger brother who got in trouble at school for a statement made to another child. That same day, Beran conducted a recorded interview of M.N. at the CAC. That recording was admitted in evidence. Beran described M.N. as "a different person" and noted that she had been in therapy for several months and "appeared to be wanting to get everything that she had off of her chest." M.N. told Beran that appellant had touched her in a sexual manner. She also showed Beran a journal she had been keeping and Beran made a copy of it.

Matthew Rockwell, a detective with the Salisbury Police Department who was assigned to the CAC in July 2018, interviewed Hughes on July 3, 2018, and again on August 9, 2018. Initially, Hughes did not admit to having knowledge about contact between appellant and M.N., but later she told Detective Rockwell that M.N. had disclosed to her sexual abuse by appellant on less than five occasions. Hughes said that she confronted appellant about the abuse and that he threatened to kill her if she told anyone. Nevertheless, Hughes disclosed the abuse to several individuals, "[a]s her way of getting help" for M.N., but she did not report the abuse to authorities. Hughes told Detective

Rockwell that appellant touched M.N. while Hughes and appellant "were fooling around." A few days after the August 9, 2018 interview, Hughes was arrested.

At trial, M.N. testified that she met appellant when she was 7 or 8 years old when she lived with her mother, her brother, and her half-sister in a house on Strawberry Way in Salisbury. Initially, appellant said he was a friend of M.N.'s mother, but later they became boyfriend and girlfriend. At some point, appellant moved into the house. M.N. testified about a number of incidents that occurred when she was in the third grade. The first time appellant touched M.N. was on a night when they were watching the movie Guardians of the Galaxy at the house on Strawberry Way. M.N., her mother, and appellant were lying on the bed in the bedroom shared by Hughes and appellant. According to M.N., her mother and appellant "started making out and then he started touching me." M.N. was under the covers. Hughes got on top of appellant and then appellant moved closer to M.N. He touched her on top of her underwear and then put his fingers underneath her underwear and on her "private," which she identified as the outside of her vagina. Eventually, Hughes got up and went downstairs to the kitchen and M.N. followed her. M.N. told her mother that appellant had touched her under her shorts, and her mother told her to go to bed. M.N. testified that she never spoke to her mother again about what happened between her and appellant because she felt like her mother "didn't like believe me."

On another occasion, when M.N. was seven or maybe eight years old, and living at the house on Strawberry Way, and when her mother and siblings were not home, appellant told M.N. to get into the shower in the bathroom that he shared with her mother. A few minutes after M.N. got in the shower, appellant entered the shower. M.N. testified that

appellant put his hands under her armpits, lifted her up, and then "he like lowered me – like he started rubbing me." Her "private was touching like his chest and he kept rubbing." M.N. used her hands to push against appellant's chest and forced herself off of him. M.N. did not tell her mother about that incident.

Another incident occurred in the home on Strawberry Way when appellant, M.N., and two of her siblings were on a bed watching a movie. All of the children were under the blankets. M.N. testified both that appellant was lying on top of the blankets and that he was under the blankets. According to M.N., appellant was wearing a shirt but was naked from the waist down. Appellant told M.N. "to suck it." M.N. had heard appellant and her mother use that phrase and she understood it to mean that she was to suck his penis with her mouth. M.N. did not want to do so, and she "wouldn't go near" appellant. Appellant "forced [her] head to, so he took his hand and put it behind my head and pushed" her onto his "private" so that her lips "barely" touched "his private." Appellant was not able to put his "private" in M.N.'s mouth because her legs were almost off the bed, and she "kind of slid off of his hand" and "ran out of the room." M.N. did not tell anyone what happened.

About a month or two later, a similar incident occurred. M.N. and appellant were in the bedroom shared by her mother and appellant. She could not recall if she had a blanket over her. Appellant again told M.N. "to suck it" and she ran out of the room. M.N. told her sister what had happened, and her sister told her "just to leave it."

M.N. testified that although appellant "pretty much lived" with her family, he had his own house. One incident occurred when M.N., appellant, her mother, and her siblings were at appellant's house. M.N. was in appellant's bedroom with her sister, who was

sleeping on the bed. M.N. was on the bed when appellant unzipped her pants and stuck his finger through the opening and touched [M.N.] and rubbed her "private" both on top of and underneath her underwear. Appellant touched her on the outside of her "private." When appellant stopped, M.N. ran out of the room. At that point, M.N.'s mother entered the bedroom. M.N. took "a glass cup" and listened through the bedroom door. She heard appellant tell her mother what he had done. M.N. testified that her mother never spoke to her about what had happened. M.N. told her grandmother what had happened.

M.N. testified that the first time she met with Beran at the CAC she did not understand why she was there and she "was scared." She did not tell Beran everything that had happened because she felt uncomfortable and "like if I told her my mom would have said that we would have gotten taken away from her." M.N. did not discuss the interview with her mother and her mother did not ask any questions about it.

After her second interview with Beran, M.N. went to live full time with her father, began seeing a therapist, and started keeping a journal to "let out [her] emotions a little bit and start feeling comfortable." When M.N. returned for her third interview with Beran, she understood why she was there and felt more comfortable because she knew Beran better and was not worried about being taken away from her father.

M.N. acknowledged that she and her sister did not like that their mother gave all her attention to her boyfriends, so they would make up stories and say things that were not true to "get them in trouble" so that their mother would "not like them anymore." On cross-examination she gave the following example:

> Like when my mom came out for dinner with us or like the guys weren't here, we went out to dinner, we would try to make up a story because my mom was always with them in her room.

M.N. also acknowledged that some of the things she told Beran were not true. She acknowledged telling Beran that appellant would never do it in the shower, that he never touched her underneath her clothes, and that he never showed her any of his private body parts. M.N. claimed she was "scared of [her] mom," and that later she "remembered it more" and was not "scared anymore." M.N. stated that the things she testified appellant did to her were true and were not made up.

Catherine Beers, a licensed clinical social worker and an expert in the field of child sexual abuse, testified that it is not common for children to make up allegations of child sexual abuse and that disclosure is "a process" that "happens over a period of time." According to Beers, M.N.'s interviews demonstrated a process of delayed disclosure.[2] She noted that M.N. told her mother, but her mother's response "prevented her" from making any further disclosures. She also noted that the abuse of M.N. was reported by a third person and that when M.N. was brought in for the initial interview "she wasn't ready for the disclosure."

Following M.N.'s reports of child sexual abuse, Hughes was charged with child neglect and contributing to the condition of a child in need of assistance. As part of a plea

[2] Beers read the transcript from M.N.'s January 16, 2019, interview with Beran prior to trial, witnessed M.N.'s trial testimony and heard, but did not view, the recorded interviews from July 3 and August 8, 2018 that were played at trial because the television in the courtroom was facing away from her. She also reviewed two police reports and two supplemental police reports.

agreement, she agreed to be interviewed by Detective Rockwell and to testify truthfully at trial. At the time of trial, she was awaiting sentencing.

Hughes testified that she first met appellant in July 2013 and they started dating shortly thereafter. At that time, Hughes had three children. Hughes and appellant later had a child together. That child was born in February 2015. Hughes and appellant moved in together in 2014. Initially, they lived in appellant's home, but later, in mid- to late 2014, Hughes and her children moved to the home on Strawberry Way. According to Hughes, from 2013 to 2015, appellant watched her children while she attended classes at Salisbury University. In 2013, Hughes told appellant that M.N. "can be clingy and to keep distance."

One evening, after Hughes returned home from a school event, M.N. told her that appellant had touched her. Hughes understood that to mean she had been touched in an inappropriate manner. Hughes believed they were living at the home on Strawberry Way at that time. Hughes confronted appellant, who did not deny that he had touched M.N. Hughes also testified that appellant admitted touching M.N. Hughes did not report the event to authorities, but instead told her father, her best friend, and her best friend's husband. Later, she told the father of one of her other children, appellant's mother, and one of appellant's friends. Hughes testified that that was her "way of getting help."

On another occasion, when Hughes, appellant, and M.N. were on the bed in the master bedroom, Hughes observed appellant touch M.N. in her private area on the outside of her clothes. After that incident, Hughes and the children left appellant's house and went to their home on Strawberry Way. As they were leaving, Hughes told appellant's friend

that appellant had touched M.N. They had no further contact with appellant until December 2014.

In December 2014, Hughes was pregnant with appellant's child and appellant wanted to be part of her life and "the dad that the kids never had." Appellant told Hughes that he would never touch M.N. again and Hughes believed him. Appellant moved into the house on Strawberry Way and he and Hughes renewed their relationship.

In 2015, M.N. told her that appellant had touched her while M.N., Hughes, and appellant were in the bed in the master bedroom watching a movie. Hughes had not observed that happen, but when she left the room and went to the kitchen, M.N. followed her and told her what happened. Hughes told M.N. to go to her room. Hughes confronted appellant, who denied touching M.N. Hughes discontinued her relationship with appellant in March 2015. She claimed that appellant told her that if she told anyone he had touched M.N., he would kill her.

Hughes testified that M.N. had some urinary tract infections between 2013 and 2015, that she was "very angry a lot," that she was "angry in everything she did, even at school," that she pulled her hair, and that she zipped up her jacket as high as it would go.

After M.N.'s first interview at the CAC, Hughes had a conversation with her and learned additional information of which she had not previously been aware. Hughes spoke with Detective Rockwell in July and August 2018. Hughes told Detective Rockwell that she knew appellant had touched M.N. and that she had told other people about it. After her second interview with Detective Rockwell, Hughes was charged and, subsequently, pled guilty pursuant to a plea agreement. Hughes testified that she was truthful in her

second interview with Detective Rockwell, but she did not know if she disclosed everything to him because she was afraid she would be charged and her children would be taken away. She denied ever covering for appellant. Hughes was not aware of M.N.'s second interview at the CAC because a safety plan had been put in place and M.N. was living with her father at that time. At trial, Hughes could not think of even one story M.N. made up to get Hughes's boyfriends "in trouble."

M.N.'s father, Michael N., testified that he was married to Hughes for about a year and has two children with her, M.N. and C.N., born February 8, 2012. He had visitation with M.N. every other weekend and was her soccer coach when she lived in the house at Strawberry Way. At the time M.N. lived at Strawberry Way, she was "very sheltered" and "seemed she was very fearful." Michael N. testified that he could tell "something was wrong," but M.N. would not "say much about it." In August 2018, he became aware that there was a criminal investigation involving appellant and Hughes. According to Michael N., M.N. started therapy in February 2018, after the discovery of suicidal comments she made on Instagram and some inappropriate messaging. In the past, M.N. was unable to be left alone and would follow Michael N. and his wife whenever they left a room, even for a "brief second." M.N. could not sleep with the door closed and left the bathroom door cracked open. He described M.N. as now feeling more comfortable and expressing her feelings more.

M.N. was visiting him on a scheduled winter vacation in January 2019. At that time, his son, C.N. got in trouble at school for standing up in the lunch room and yelling

something. When M.N. heard what C.N. said, she confided in her stepmother. Thereafter, M.N.'s father contacted M.N.'s therapist and DSS.

Two witnesses testified on appellant's behalf. His maternal grandmother, Susan Weiss, who is a registered nurse, testified that she stayed with Hughes and appellant in the home on Strawberry Way after the birth of appellant and Hughes's baby daughter in February 2015. She witnessed all the children playing with appellant and did not observe anything unusual.

Appellant's mother, Cynthia Cephas, testified that she observed appellant with Hughes and her children from 2013 through 2015, and that from about June through August 2015, Hughes and the children lived with her. Cephas went to their house almost every day because she did not believe the children were being fed properly, were not getting their homework done, and were not being bathed. Her visits to the home on Strawberry Way became more frequent in preparation for the birth of her granddaughter in February 2015. Cephas described M.N. as "a little clingy," "wanting attention," and always trying to sit on appellant's lap or near him. M.N. would sit on appellant's lap, hug him, and say she was going to marry him. Cephas told appellant to put M.N. down and have her sit in a chair because Cephas "felt uncomfortable." On one occasion, Cephas observed M.N. put a toy near her rectum. Cephas spoke to M.N. about the need to protect her private area and to tell someone if anything happened. Cephas told Hughes about the incident with the toy and that M.N. needed some help. Cephas testified that she did not see any improper behavior between appellant and M.N.

Appellant testified in his own defense. He met Hughes when she brought her vehicle to be repaired in the shop where he worked. Within a couple of months, Hughes and her three children, including M.N., had moved into his home on Ocean Gateway. Initially, Hughes worked at a daycare, but later in their relationship, she stopped working and went to school full time. Appellant supported Hughes and the children and Hughes received additional funds from her family. Appellant watched Hughes's children about two times when she did an "intern or something," but otherwise they stayed with Hughes's friend Lauren. As time went by, Hughes became unhappy with their relationship because appellant did not do anything with her and the children. They had arguments on a weekly basis.

Appellant described M.N. as "nosey and clingy," said that her clinginess was uncalled for and "too grown for [M.N.'s] age," and said that she questioned adults and interjected in conversations between him and Hughes about work and finances. Appellant testified that he and M.N. "butt[ed] heads a little bit" "because [he] wanted her in a child's place." Appellant described himself as being "very big" on discipline. He described Hughes as being "very lazy." Appellant's relationship with Hughes got progressively worse.

In December 2014, appellant moved back into Hughes's house. He testified that he stayed long enough to get text messages to use against her in a custody case involving their daughter. He moved out at the end of March 2015 because of their arguments. He went back periodically to visit his daughter, but Hughes kept the child away from him. In August 2015, he sought a protective order for his infant daughter and filed for custody, asserting

child neglect on the part of Hughes. Appellant denied all allegations by M.N. and testified that Hughes never approached him about any inappropriate behavior or physical contact with M.N. Appellant claimed that Hughes does not like him, filed false police reports about him, and had him arrested and charged with second-degree assault for touching "her pinky" during an exchange of their daughter. According to appellant, police reviewed a video recording and said he "did nothing." He asserted that Hughes would "tell anything if it benefits her."

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

DISCUSSION

I.

Appellant contends the trial court erred in excluding evidence that M.N., who had a history of fabricating claims against her mother's romantic partners and made a similar allegation of abuse against an individual other than him. This issue arose when, during Beran's testimony, the State played the video recording of M.N.'s July 3, 2018 interview and also provided the jury with a transcript of that interview. The prosecutor planned to stop playing the video recording at the point where M.N. made certain allegations against another man, whom we shall refer to as "C." M.N. claimed that C. tickled her, trapped her, and touched her private parts over her clothing on one occasion when they were at C.'s

house in North Carolina.[3] The prosecutor argued that M.N.'s allegations against C. were not relevant to the instant case, were "unsubstantiated," and "haven't been investigated[.]"

Defense counsel objected and requested that the video be played "in whole" because the allegations made by M.N. about C. were "substantially similar," "relevant," and "show a pattern of the alleged victim coming up with allegations similar to those as are presented in this case, which we believe are fictional." The following colloquy occurred:

> THE COURT: [Defense counsel], how is it relevant and not in the context of too prejudicial to be admitted?
>
> [DEFENSE COUNSEL]: I think it's prejudicial to Mr. White to have it not be admitted. The alleged victim testified that she's –
>
> THE COURT: But normally a victim's sexual history or sexual knowledge is not admissible in the context of the current case. I mean it's, you know, in effect like the rape shield law or something of that case, you can't bring in someone's prior conduct, let's say, as a way of attacking them. Now this wouldn't be a rape shield law context but sort of under that same framework, how are you able to use someone being a victim in another case in this case?
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> [DEFENSE COUNSEL]: Well, it becomes relevant when the victim has volunteered to this jury that she's made up stories to get her mother's paramours in trouble and if the jury hears the redacted version, they could

[3] M.N. told Beran that C., who lived in North Carolina and was married to Hughes at the time of the interview, "did the same thing" as appellant, but "[h]e only did it once though." M.N. said she went to C.'s house in North Carolina and "he kind of just came in the room and tickled" her. M.N. gave Beran a specific street address and thought that it might have been in Raleigh. She said that C. "did the same thing but [her sister] wasn't there." M.N. said her pants were on and C. tickled her with his hands, then trapped her, and started touching her "private parts." She tried to move, but C. was "really strong" and "kept like going stronger." C. did not ask her to touch him. M.N. told her mother about the incident and also wrote about it in a letter because her mother "didn't believe me the first time[.]" M.N. told Beran that Hughes said C. "wouldn't do stuff like that, but she asked [C.], and he denied it. M.N. said "[t]hey didn't break up or anything and I was pretty mad about that." M.N. did not tell anyone else about what happened with C. Hughes and C. were still together at the time M.N. was interviewed on July 3, 2018.

very likely conclude that you're saying she makes up stories but we're only hearing this one about Austin White. Whereas we have here two –

THE COURT: But she's testified to that. I mean she concedes in her cross-examination that she's made up stories to try to get her mother's boyfriends in trouble.

[DEFENSE COUNSEL]: We would proffer that Exhibit A of that is the story that she's made up related to Mr. White, Exhibit B is the one that's on the video.

THE COURT: But we don't know that about this North Carolina case. It's not been adjudicated or litigated or investigated as far as we know.

[DEFENSE COUNSEL]: No, I don't see how that strengthens the State's position, that it's been investigated or confirmed.

THE COURT: I'm not sure it helps either one of your positions, is my point.

[DEFENSE COUNSEL]: And if we're getting into the redaction business it's just not a body of the law that favors redaction. Usually it favors the document or the video coming in in whole, it's something – it was sort of the natural flow of the conversation.

THE COURT: Okay.

[DEFENSE COUNSEL]: That would be our position, I do want to make it for the record.

THE COURT: The Court notes your position. The Court finds that the prejudicial effect is not outweighed and therefore I'm not going to allow it.

A. Maryland Rules 5-806 and 5-616

In support of his argument that the trial court erred in denying his request to play for the jury the portion of M.N.'s interview involving C., appellant directs our attention to

Md. Rule 5-806,[4] permitting the credibility of a declarant to be attacked when a hearsay statement has been admitted in evidence, and Md. Rule 5-616,[5] permitting a party to attack the credibility of a witness by proving a witness made inconsistent statements or is biased, prejudiced, interested in the outcome, or has a motive to testify falsely. At trial, defense

[4] Maryland Rule 5-806 provides:

> (a) **In general**. When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.
>
> (b) **Exception.** This Rule does not apply to statements by party-opponents under Rule 5-803(a)(1) and (a)(2).

[5] Maryland Rule 5-616 provides, in part, as follows:

> (a) **Impeachment by inquiry of the witness**. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
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> (1) Proving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony;
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> (2) Proving that the facts are not as testified to by the witness;
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> * * *
>
> (4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely[.]
>
> * * *
>
> (b) **Extrinsic impeaching evidence**. (1) Extrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 5-613(b).

counsel's arguments related to relevance and the rule of completeness. No argument was made with respect to Md. Rules 5-806 or 5-616, and the court did not address or rule on them. As issues pertaining to those rules were not presented in the trial court, they are not properly before us. Md. Rule 8-131 ("Ordinarily, the appellant court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Even if those arguments had been preserved for our consideration, appellant would fare no better. Appellant's reliance on Md. Rule 5-806 is misplaced because there was absolutely no evidence that M.N. previously made a false statement similar to the allegations she made against him. M.N. acknowledged making up stories about her mother's boyfriends to get them in trouble, but she never stated that she made up stories of sexual abuse and she never admitted making false allegations against C. Appellant also asserts that, absent M.N.'s statements about C., the jury was left with M.N.'s statement to Beran that appellant was the only person to sexually abuse her. The record does not support that assertion. M.N.'s statement to Beran was made in the context of people whose "hand ever made contact with [M.N.'s] bare skin[.]" M.N. told Beran that C. touched her inappropriately, but over her clothing. As a result, M.N.'s report of sexual abuse by C. would do nothing to attack her credibility under Md. Rule 5-806.

Similarly, appellant's reliance on Md. Rule 5-616 to introduce M.N.'s statements about C. to establish that she had a motive to lie, is misplaced. In support of his argument, appellant relies on *Devincentz v. State*, 460 Md. 518 (2018). In that case, the trial court sustained an objection to hearsay evidence that the victim had screamed at the defendant,

"saying things that she could do that would get [him] in trouble." *Devincentz*, 460 Md. at 559. The Court of Appeals held that the trial court erred in excluding that evidence because it showed potential bias on the part of the witness. *Id.* In the instant case, appellant sought to admit allegations made by M.N. against C. Unlike *Devincentz*, there was no evidence that M.N. threatened to make false allegations against appellant or C. Importantly, we note that the evidence presented at trial showed that M.N. made up stories about her mother's boyfriends and that M.N. did not like appellant. It was for the jury to determine the extent, if any, by which those things biased M.N. and whether her allegations against appellant were fabricated.

B. The Rule of Completeness

Appellant argues on appeal, as he did in the trial court, that M.N.'s statements about C. were admissible pursuant to the rule of completeness. Maryland Rule 5-106 provides:

> When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In *Holmes v. State*, we held that to be admissible under the doctrine of completeness, "the portion submitted must explain the part already in evidence or correct a misleading impression left by the evidence previously introduced." 116 Md. App. 546, 557 (1997). M.N.'s statements about C. would not have explained any other statements that were already in evidence nor would they have corrected a misleading impression. There was no evidence that C. had been charged with or convicted of the sexual abuse of M.N., and introduction of evidence about M.N.'s statements about C. would have introduced extrinsic

matters unrelated to appellant that might have confused the jury. The trial court did not abuse its discretion in rejecting appellant's argument that M.N.'s statements about C. should be admitted pursuant to the rule of completeness.

C. Legal Standard

Appellant argues that the trial court applied the wrong legal standard in excluding evidence of M.N.'s statements about C. Maryland Rule 5-403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

According to appellant, in concluding that the "prejudicial effect was not outweighed," the trial court incorrectly allocated to him the burden of proving that the probative value of M.N.'s statements was so high that it outweighed any danger of prejudice when, in fact, exclusion was justified only if the probative value was substantially outweighed by the danger of unfair prejudice. He suggests that the court's error might be attributable to its attempt to analogize the case to one involving the rape shield law, codified in § 3-319(b), which provides, in part, that "[e]vidence of a specific instance of a victim's prior sexual conduct" may be admitted if, among other things, "the inflammatory or prejudicial nature of the evidence does not outweigh its probative value[.]" "The principal reason for the rape shield statute 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 (1991). Appellant maintains that the concerns that support the exclusion of evidence under the rape shield statute were not present in the instant case

because appellant was not seeking to impugn M.N.'s character with evidence of prior sexual conduct. Rather, he took the position that M.N. had not been sexually abused by him or anyone else.

Our review of the record reveals that the trial court did not misapply the legal standard. That the trial judge knew the appropriate legal standard was made clear in his question to defense counsel, "how is it relevant and not in the context of too prejudicial to be admitted?" In this phrase, the trial court demonstrated that it assessed properly the relative weights of probative value and prejudicial danger. The trial judge's use of the phrase "prejudicial effect was not outweighed" was nothing more than a less than artful reference to the rule that counsel and the judge were clearly aware of and were discussing. Moreover, we find no error in the trial court's comments or consideration of the purpose of the rape shield statute in considering the prejudicial effect of introducing M.N.'s allegations against C. in a case involving alleged sexual abuse by appellant. The judge specifically stated, "[n]ow this wouldn't be a rape shield law context . . . ." Reference to that statute did not result in the trial court's application of an erroneous legal standard.

D. Relevance

Appellant argues that M.N.'s allegation of abuse by C. was relevant to his defense that she fabricated the allegations against him and that the evidence was not unfairly prejudicial. Even assuming that the trial court applied the proper standard, appellant argues that it still erred in undervaluing the probative value of M.N.'s statements and overvaluing the danger of unfair prejudice. He asserts that M.N.'s allegations about C. were not likely to produce an overwhelming emotional reaction in the jurors, the State

would not be surprised by the evidence, and there was no reasonable possibility that the jury might misuse the evidence. M.N.'s statements would, however, have provided evidence that M.N. and her sister had a practice of making false allegations against their mother's romantic partners in order to get the men in trouble; that M.N. claimed that C. did the same thing as appellant; that M.N. was angry that after she told her mother what C. had done, they did not break up; that M.N. had denied that anyone other than appellant touched her inappropriately; that M.N. testified that she stopped confiding in her mother after she told her about one incident of abuse by appellant, yet also told Beran that she reported to her mother the abuse by C.; and, that M.N. had expressed concern for the welfare of her other siblings, including the child of appellant and Hughes. We disagree and explain.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Evidence that is not relevant is not admissible." Md. Rule 5-402. The party seeking admission of evidence bears the burden of establishing its relevance, but this threshold "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018); *State v. Simms*, 420 Md. 705, 727 (2011). As we have already noted, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Whether evidence is "unfairly" prejudicial is not judged by whether the evidence hurts one's case, but by whether it "might influence the

jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013).

When balancing relevance against the danger of unfair prejudice, "we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns" as outlined in Md. Rule 5-403. *State v. Simms*, 420 Md. at 725. We review without deference a trial judge's legal conclusion that a piece of evidence is relevant. *Id.* at 724–25. If the evidence is relevant, "[t]rial judges generally have wide discretion when weighing the relevancy of evidence" against the dangers of unfair prejudice. *Id.* at 724.

Evidence of M.N.'s statements about C. were not relevant. There was absolutely no evidence that M.N.'s allegation of abuse by C. was a lie. As a result, the fact that she alleged that C. sexually abused her was not relevant to the determination of her credibility with regard to her allegation of sexual abuse by appellant. M.N.'s statements about C. showed only that at some time after she was sexually abused by appellant, she was sexually abused by another man. There is also no merit to appellant's argument that M.N. reported the allegations against C. to her mother "with the intent of causing them to break up." M.N. said that she was "pretty mad" that her mother did not break up with C. after being informed of her allegations, but M.N. never stated that the reason for reporting the allegation was to cause a breakup.

Even if M.N.'s allegations against C. were relevant, the balancing test required by Md. Rule 5-403 would weigh in favor of excluding the evidence because there was a strong

potential for the jury to be confused or misled by this collateral issue. The issue before the jury was whether appellant sexually abused M.N. Evidence of M.N.'s abuse by C. was of no consequence to the determination of the charges against appellant. The introduction of evidence about M.N.'s allegations against C. would have shifted the jury's attention to whether those allegations of abuse were true and would have resulted in a mini trial concerning allegations unrelated to appellant.

II.

Appellant contends that, on two occasions, the trial court erred in admitting hearsay concerning statements allegedly made by M.N. to her mother. First, on direct examination of Hughes, the State elicited testimony that M.N. told her that appellant "had touched her" on an occasion before they moved into the house on Strawberry Way. Second, the State elicited testimony from Detective Rockwell that Hughes told him that M.N. had reported abuse by appellant "less than five times." We find no merit in either contention.

A. 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). Hearsay is generally inadmissible as evidence, subject to certain exceptions. Md. Rule 5-802. In the absence of a provision providing for the admissibility of a hearsay statement, a trial court has no discretion to admit the hearsay. *Paydar v. State*, 243 Md. App. 441, 452 (2019) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). Whether information is admissible as hearsay is a question we review de novo. *Bernadyn*, 390 Md. at 8.

B. Testimony of Hughes

The first statement challenged by appellant was made during the direct examination of Hughes:

> [PROSECUTOR]: During that timeframe of 2013 to 2015 did there ever come a time that [M.N.] came to you about any inappropriate behavior by Mr. White?
>
> [HUGHES]: Yes.
>
> [PROSECUTOR]: Do you recall approximately when she would have come to you about that?
>
> [HUGHES]: When I was in school at Salisbury University he watched the kids, three children.
>
> * * *
>
> [PROSECUTOR]: Okay. And so then would he be responsible for the children when you would be at school?
>
> [HUGHES]: If I needed someone, yes.
>
> [PROSECUTOR]: Okay.
>
> [HUGHES]: He would watch the kids so I could attend. And that's what happened, when I went to the James Bennett speaker presentation, as soon as I left I called him and asked how the kids were doing, what are they doing. They were fine, they were okay. Got to his house and it was dark, it was dark when I got to the home, to his home. And [M.N.] was sitting on the couch. The kids were already in beds, the other two. And [M.N.] told me that he had touched her.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Basis.
>
> [DEFENSE COUNSEL]: Hearsay.
>
> [PROSECUTOR]: Your Honor, it's a prompt claim of sexual assault and it would have been within the timeframe of 24 to 48 hours, so it is admissible.

THE COURT: Overruled.

Hearsay exceptions for prior statements by a witness are addressed in Md. Rule 5-802.1, which provides, in relevant part:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *
>
> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]

Appellant does not dispute that M.N.'s statement to her mother was prompt, but he argues that it was not consistent with M.N.'s testimony because M.N. recalled telling her mother about appellant's abuse on only one occasion, which occurred when appellant, Hughes, and M.N. were watching a movie together. Appellant asserts that M.N. did not claim she forgot reporting this event to her mother, but "expressly denied making any other report other than the one that followed the alleged incident" when the three were watching a movie together. In addition, he notes that M.N. did not mention any incidents of abuse that occurred at his house before M.N.'s family moved to the house on Strawberry Way. As a result, appellant maintains that "the *story* Ms. Hughes said her daughter reported to her was substantively different than—and inconsistent with—M.N.'s testimony." We are not persuaded.

Both parties direct our attention to *Nelson v. State*, 137 Md. App. 402 (2001), in which the defendant challenged the admission of a prompt complaint of rape made by the

victim to her sister. *Nelson*, 137 Md. App. at 412. Nelson argued that the hearsay statement of a prompt complaint was inconsistent with the victim's trial testimony. *Id.* In rejecting that argument, we explained the consistency requirement as follows:

> We hold that the required consistency between the declarant's "statement ... of prompt complaint" and "the declarant's testimony" contemplates a substantive consistency between 1) the content itself of the out-of-court statement and 2) the content of the trial testimony. Are the two stories themselves compatible? The concern is not with whether the victim can now, as a witness, accurately recall the details of precisely when and where and to whom her earlier declaration was made. It is the hearsay auditor [the victim's sister] who must, on the witness stand, vouch for those circumstances. The required consistency is between 1) the story told by the victim on the witness stand and 2) the story heard and reported by the hearsay auditor.
>
> It is the victim who testifies directly as to her version of the crime story. It is the hearsay auditor who testifies indirectly as to the victim's earlier version of that same story. Our focus is on whether what the victim says now is compatible with what the victim said then. Our required witness to what the victim said then is not the victim herself, but someone else who heard the victim say it. It is not required that the victim, as a witness, even recall having made the earlier out-of-court declaration, let alone recall the surrounding circumstances or the precise content of that earlier complaint. It is the hearsay auditor, not the declarant, who is the necessary witness to the actual uttering of the out-of-court declaration.

Id. at 413–14 (footnote omitted).

Appellant is correct in that M.N. recalled telling her mother about the abuse on only one occasion. Our decision in *Nelson* makes clear, however, that there is no requirement that M.N. recall making the earlier out-of-court declaration to her mother, nor is she required to recall the surrounding circumstances or the precise content of her earlier complaint. The issue to be resolved is whether M.N.'s testimony was consistent with Hughes's recollection of a prompt complaint that appellant "touched her." The record makes clear that it was consistent.

M.N. testified about numerous incidents when appellant touched her in a sexual manner when her mother was not present, or when she was unsure of whether her mother was in the home. M.N. testified that the first incident happened in the home on Strawberry Way, while M.N., Hughes, and appellant were in bed watching the "Guardians of the Galaxy" movie, and her mother and appellant began "making out." Appellant put his hands on M.N.'s "private" on top of, and then under, her underwear. M.N. told her mother about that incident. Another incident occurred while M.N. was in the shower in the home on Strawberry Way and appellant entered the shower, picked her up, and rubbed her private area against his chest. M.N. testified that she did not tell her mother about that incident. M.N. also testified that appellant told her to "suck it," and then pushed her head down so that her lips slightly touched his penis. A month or two later, when appellant and M.N. were in a bedroom, he again told M.N. to "suck it," and she told her sister about the incident. On another occasion, M.N. testified that while she was at appellant's house, at a time when she believed her mother was in the kitchen, appellant unzipped her pants, stuck his finger in the opening, and touched and rubbed her private area both on top of and underneath her underwear. Although M.N. did not testify that she told her mother about this incident, she testified that when appellant stopped on his own, M.N. "ran out of the room," and then her mother "came in." M.N. then heard appellant tell her mother what he had done.

M.N. recalled telling her mother that appellant touched her on one occasion and that her mother confronted appellant about another occasion that occurred at appellant's house. That testimony was consistent with Hughes's recollection of M.N.'s prompt complaint that

appellant "touched her." It was not necessary for M.N. to recall having told her mother that appellant touched her while she was in appellant's home prior to the time the family moved to the house on Strawberry Way. Rather, the question is whether M.N.'s testimony was consistent with her mother's recollection of a prompt complaint that appellant touched her. Notwithstanding the fact that M.N. did not recall telling her mother about the incident that her mother recalled, and that the accounts given by M.N. and her mother differed with regard to certain details, M.N.'s account of events was not inconsistent with the prompt report of abuse about which Hughes testified. Hughes's testimony that M.N. told her that appellant touched her was consistent with M.N.'s testimony that she told her mother that appellant touched her.

Appellant's reliance on *Lawson v. State*, 160 Md. App. 602, *rev'd on other grounds*, 389 Md. 570 (2005), is misplaced. In that case, the victim testified that Lawson unsuccessfully tried to pull down her pants, after which nothing happened. *Id.* at 619. That testimony conflicted with the testimony of the victim's mother who said that the victim told her that Lawson had raped her. *Id.* We recognized that the testimony of the victim and the victim's mother were "not only completely at odds, but differed as to whether in fact the crime of rape had ever occurred on that date[.]" *Id.* In the instant case, the substance of Hughes's testimony and M.N.'s testimony were consistent. As a result, the trial court did not err in admitting the statement as a prompt complaint of sexually assaultive behavior to which the declarant was subjected, pursuant to Md. Rule 5-802.1(d).

C. Testimony of Detective Rockwell

Appellant contends the trial court erred in admitting in evidence the testimony of Detective Rockwell regarding a statement made by Hughes concerning M.N.'s disclosure of sexual abuse. During the direct examination of Detective Rockwell, the prosecutor questioned him about his August 2018 interview of Hughes as follows:

> [PROSECUTOR]: During the course of that interview of August 9th of 2018 did Ms. Hughes make any statements to you as to whether or not her daughter [M.N.] had ever disclosed sexual abuse to her?
>
> [DET. ROCKWELL]: Yes, she did.
>
> [PROSECUTOR]: Did she tell you how many times [M.N.] had disclosed that sexual abuse?
>
> [DET. ROCKWELL]: I recall she advised that it was less than five times.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Basis?
>
> [DEFENSE COUNSEL]: Hearsay.
>
> [PROSECUTOR]: Your Honor, it would be a prior consistent statement by Ms. Hughes to rebut any inference that she fabricated any testimony today.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: I'm sorry, I didn't hear your answer.
>
> [DET. ROCKWELL]: She stated to me that it was less than five times.

The exception to the rule against hearsay that permits the introduction of a prior consistent statement is found in Md. Rule 5-802.1(b), which provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *

> (b) 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.

The Court of Appeals has held that "in order to be admissible under Md. Rule 5-802.1(b), a prior consistent statement must have been made before the alleged fabrication or improper influence or motive arose." *Holmes v. State*, 350 Md. 412, 424 (1998).

Appellant argues the exception to the rule against hearsay for prior consistent statements did not apply in the case at hand because, at the time Detective Rockwell interviewed Hughes, she already had a motive to minimize her involvement in any abuse of her daughter in order to exculpate herself and avoid losing custody of M.N. In addition, appellant asserts that even if the State satisfied the basic requirements of Md. Rule 5-802.1(b), Detective Rockwell's statement contained multiple levels of hearsay, each of which was required to fall within an exception to the hearsay rule. According to appellant, the State failed to offer an independent basis for the admission of M.N.'s statement to Hughes and none is evident. We disagree.

At the time of Detective Rockwell's second interview of Hughes in August 2018, Hughes was not under arrest and M.N. was still living with her. Even assuming that she was worried that she would be charged with a crime or lose custody of M.N., it is not reasonable to assume that those motivations would lead her to make a false statement about M.N.'s disclosures to her. As the State points out, if Hughes was seeking to minimize her involvement, her admission that she was aware that M.N. had been sexually abused but did not report that to authorities was contrary to her interests. There is a lack of connection

between appellant's suggestion that Hughes had a motive to minimize her involvement in the abuse of M.N. and Hughes's statement to Detective Rockwell that M.N. disclosed the abuse to her less than five times. Thus, we conclude the trial court did not err in admitting Detective Rockwell's statement.

Even assuming there was error in admitting the evidence as a prior consistent statement, the statement could have been admitted pursuant to Md. Rule 5-616(c)(2) for the limited purpose of rehabilitation.[6] Appellant challenged Hughes's credibility by questioning her about the condition of her plea agreement that required her to testify against him and her failure to disclose everything she could have disclosed to Detective Rockwell. Accordingly, the fact that her testimony was consistent with what she told Detective Rockwell detracted from her impeachment and could have been offered for the limited purpose of showing that she consistently described the number of times M.N. reported sexual abuse by appellant.

Appellant argues that Detective Rockwell's statement should have been excluded because it contained multiple levels of hearsay. That argument was not raised in the trial court and, therefore, was not preserved properly for our consideration. Md. Rules 4-323(a)

[6] Maryland Rule 5-616(c)(2) provides:

> (c) **Rehabilitation.** A witness whose credibility has been attacked may be rehabilitated by:
>
> * * *
>
> (2) Except as provided by statute, evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]

and 8-131(a). Even if this argument had been raised below, Detective Rockwell's statement did not contain additional hearsay. When asked how many times Hughes claimed that M.N. reported abuse to her, Detective Rockwell responded, "I recall she advised that it was less than five times," and "[s]he stated to me that it was less than five times." The statement "less than five times" does not constitute hearsay within hearsay. Hughes did not make any assertion about the five statements made by M.N., but merely conveyed the total number of times M.N. reported abuse to her.

III.

Appellant contends that the sentencing court erred in imposing a sentence for second-degree rape because the modality under which he was convicted did not exist at the time of the alleged offense. The State agrees and so do we.

On February 4, 2019, appellant was charged by indictment with, among other things, four counts of second-degree rape that occurred between 2013 and 2015. During trial, the State clarified that each count of second-degree rape alleged a different type of conduct. Count three alleged vaginal intercourse, counts four and five alleged oral sex, and count six alleged digital penetration. The trial court granted appellant's motion for judgment of acquittal as to Count 5, leaving only one count of second-degree rape based on oral sex. The jury acquitted appellant of counts three and six, but found him guilty of count four, which had been submitted to the jury as "Rape in the Second Degree (Fellatio)." As we have already noted, the court sentenced appellant on count four to an enhanced sentence of twenty-five years, with all but fifteen years suspended, to be served concurrent to the sentence imposed for count one.

Appellant is correct that prior to 2017, second-degree rape did not include fellatio, but had only one modality—vaginal intercourse.[7] Md. Code (2012 Repl. Vol.), § 3-304 of the Criminal Law Article. Recently, in *Shannon v. State*, the Court of Appeals stated that "if a charging document fails to charge a cognizable crime, a court "'lacks fundamental subject matter jurisdiction to render a judgment of conviction[.]'" 468 Md. 322, 328–29 (2020) (quoting *Williams v. State*, 302 Md. 787, 792 (1985)). Similarly, in *Williams*, the Court wrote that "[a] claim that a charging indictment fails to charge or characterize an offense is jurisdictional" because "a court is without power to render a verdict or impose a sentence under a charging document which does not charge an offense within its jurisdiction." *Williams*, 302 Md. at 791–92. The Court of Appeals has also held that an assertion that the charged offense was not actually a crime may be considered at any time. *State v. Johnson*, 415 Md. 413, 420 n.5 (2010); *Lane v. State*, 348 Md. 272, 278–79 (1997). Because at the time of the alleged offense, there was no crime of second-degree rape based on fellatio, the trial court lacked jurisdiction to convict and sentence appellant for that non-existent crime.

In light of our holding, we shall exercise our discretion to vacate all of appellant's sentences. *Twigg v. State*, 447 Md. 1, 27–30, 30 n.14 (2016). We exercise that discretion so as to provide the circuit court with the "maximum flexibility on remand to fashion a

[7] In 2017, the Legislature expanded the definition of second-degree rape to cover a broader range of conduct, including fellatio. *See* 2017 Md. Laws Ch. 161 & 162 (S.B. 944 and H.B. 647). *See also* Md. Code (2012 Repl. Vol., 2018 Supp.), § 3-304(a) of the Criminal Law Article (providing that a person is guilty of second-degree rape when he or she "engage[s] in vaginal intercourse or a sexual act with another . . . by force, or the threat of force, without the consent of the other[.]").

proper sentence that takes into account all of the relevant facts and circumstances," so long as it does not exceed the original aggregate sentence. *Id.* at 30 n.14.

CONVICTION AND SENTENCE FOR SECOND-DEGREE RAPE VACATED; JUDGMENTS OF CONVICTION OTHERWISE AFFIRMED; SENTENCES IMPOSED ON ALL OTHER COUNTS VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR RESENTENCING HEARING; COSTS TO BE PAID ONE-THIRD BY WICOMICO COUNTY AND TWO-THIRDS BY APPELLANT.