Circuit Court for Montgomery County
Case No. 133893C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1408

September Term, 2019

DAVON GRAY

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Alpert, Paul E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: February 16, 2022

Davon Gray, appellant, was convicted of first-degree rape, armed robbery, and use of a firearm in the commission of a crime of violence by a jury sitting in the Circuit Court for Montgomery County. On September 11, 2019, the court sentenced appellant to life imprisonment for: (1) first degree rape, with all but 60 years suspended, (2) armed robbery with a consecutive term of 20 years, all suspended, (3) use of a firearm in the commission of a crime, adding a concurrent term of five years, and (4) five years' post-release probation. The Appellant presents the following two questions for our review:

1. Did the trial court err by admitting the victim's, ("S.'s") [1] account of the rape as told to her sister and Sergeant Arsenault?

2. Did the trial court err by admitting S.'s narrative of the rape as contained in the forensic nursing record?

For the reasons stated herein, we shall affirm the judgments of the circuit court.

BACKGROUND

At or around nine o'clock on the morning of December 7, 2010, S. reported to a Gaithersburg retirement community where she worked as a dining room server. Upon her arrival, S. entered a women's restroom, where she removed her coat and began to fix her hair in anticipation of her upcoming shift. As she did so, a man, whom S. identified at trial as appellant, entered the restroom, walked to the right stall, and went inside. When S. attempted to leave, the man emerged from the stall and accosted her from behind, grabbing her neck with his left arm and holding a silver and black handgun to the side of her head. The assailant then "asked" S. to surrender her personal belongings, including her phone

[1] The victim shall be referred to by her first initial to protect her privacy.

and wallet. After removing approximately $20 to $30 from the wallet, the man forced S. into the left bathroom stall and instructed her to pull down her pants. With the handgun still aimed at her head, the assailant ordered S. to perform fellatio on him, but warned her not to look at him. When she protested, he demanded that S. bend over. The man then repeatedly penetrated her vagina with his penis. Throughout the assault, the assailant told S. to "stop crying" and to "shut up."

Following the assault, the assailant instructed S. to remain in the stall and threatened to shoot her if she did not comply. Thereafter, he left the restroom. Approximately five minutes later, S. emerged from the restroom and went to work. There, she encountered a coworker who asked how she was doing. S. responded with tears but did not inform her colleague that she had been raped.

Approximately 30 minutes after the assailant had fled, S. reported the incident to her supervisor, who contacted the police. Moments later, officers of the Montgomery County Police Department ("MCPD") responded to the scene and escorted S. from the dining room to a conference room to interview her. At trial, S. testified that during her interview with MCPD, she described her attacker as a light-skinned "African American male, about 6'1" or 6'2" tall, [with a] medium build, clean shaven, no beard." S. further recalled having described his attire as having included "jeans, all-white shoes, and a gray or dark blue jacket" with a hoodie pulled over his head. According to the testimony of Sergeant John Arsenault, an interviewing officer, S. described her assailant as "a black male, light skin coloring, mid to late 20's" who was hairy and had a clean beard. He further

recalled that S. had stated that the man had worn shiny white shoes and "a gray jacket with black stripes down the sleeves."

Around 12 or 1 o'clock on the afternoon of the assault, the police contacted S.'s sister, hereinafter "A.," and informed her of the attack. Upon her arrival at the scene, A. was guided to the conference room where the police interview of S. was underway. At trial, A. recounted having overheard S. tell an interviewing officer that a black man armed with a handgun had forced her to pull her pants down and had raped her.

Following the interview, A. accompanied S. to the hospital where Dr. Katharine Scafide, then a forensic nurse examiner, took S.'s medical history and performed a physical examination. That examination entailed swabbing S.'s external genitalia, thighs, and buttocks. The clothes that S. had been wearing during the assault were then collected and bagged as evidence. A gynecological examination revealed "redness … around the opening to her cervix" consistent with trauma.

The swabs were subsequently submitted to the MCPD Forensic Biology Unit for DNA analysis. Erin Farr, a scientist with the Forensic Biology Unit, examined S.'s underwear and discovered sperm in the crotch area thereof. Ms. Farr then extracted DNA from the swab of S.'s genitalia, as well as a sample from her underwear, and developed a mixed DNA profile with the major contributor having been S. and the minor contributor having been an as-yet unidentified male.

At approximately 4:00 p.m. on the date of the assault, Corporal Ray Bennett and Detective Robert Zaal were on routine patrol in the vicinity of Middlebrook and Frederick

Roads. There, they arrested appellant for an unspecified crime and found him to have been in possession of a black and silver handgun. At the time of that arrest, Detective Zaal testified, appellant had been wearing "all dark clothing and white shoes."

In 2018, Detective Dave Davis of the MCPD Cold Case Unit developed appellant as a suspect in a rape case. That May, Detective Davis's partner, Detective Frank Colbert, collected a buccal swab from appellant. From that sample, Ms. Farr developed a DNA profile which she compared to the DNA recovered from S.'s underwear and genitalia. Those comparative analyses indicated that appellant had been the minor contributor to the DNA found on S.'s underwear and genitalia. At trial, Ms. Farr testified that the likelihood that the male DNA found on S.'s underpants belonged to an individual unrelated to appellant was approximately one in 5.7 quadrillion. Regarding the sample taken from S.'s genitalia, she further averred that "the probability of randomly selecting an unrelated individual would be included as a contributor to the mixed DNA profile at the qualifying low side is approximately 1.3 thousand." **[T3 at 216]**

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

STANDARD OF REVIEW

Although we generally review judicial determinations on the admissibility of evidence for abuse of discretion, "'[r]eview of the admissibility of evidence which is hearsay is different.'" *Thomas v. State*, 429 Md. 85, 98 (2012) (quoting *Bernadyn v. State*, 390 Md. 1, 7–8 (2005)). The Court of Appeals stated:

> Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is

> "permitted by applicable constitutional provisions or statutes." Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo* . . . [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal[.]

Gordon v. State, 431 Md. 527, 535–36; 5386 (2013) (quoting Md. Rule 5–802) (emphasis omitted). We will not, however, disturb the factual findings underlying those determinations absent clear error. *Id*. at 538.

DISCUSSION

I.

A. The Parties' Contentions

Appellant contends that the court erred by permitting Sergeant Arsenault and A. to testify to S.'s out-of-court statements, arguing that those remarks constituted inadmissible hearsay. The State responds that the challenged hearsay statements were admissible to rebut an implied charge of improper influence pursuant to Maryland Rule 5–802.1(b).[2] As

[2] Maryland Rule 5-802.1 Hearsay Exceptions – Prior Statements by Witnesses

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;

. . .

Md. Rule 5-802.1(b).

to A.'s testimony, the State further asserts that the out-of-court statements recounted by A. were admissible as prompt complaints of sexual assault under Maryland Rule 5–802.1(d).[3] Anticipating the State's arguments, appellant denies having made an implied charge of fabrication and claims that Sergeant Arsenault and A. testified to S.'s "entire account of the rape," thereby exceeding the scope of 5–802.1(d).

B. Background

During the following colloquy, the State asked A. to recount statements that she had overheard S. make during her police interview.

> [THE STATE]: And at some point[ ]in time did you learn from your sister what had happened to her?
>
> [A.]: Yes.
>
> [THE STATE]: And when was that?
>
> [A.]: She was giving the description to the officer.
>
> [THE STATE]: And can you remember about what your sister said that happened?

[3]Maryland Rule 5-802.1 Hearsay Exceptions – Prior Statements by Witnesses

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. . .

Md. Rule 5-802.1(d). The State also contends that appellant's assertions are largely unpreserved for our review. We shall assume, without deciding, that defense counsel's repeated objections to the State's questions and to the witnesses' answers sufficed to preserve any error in admitting these out-of-court statements and will therefore proceed directly to the merits of appellant's claim.

[DEFENSE COUNSEL]: Objection.

THE COURT: At the time of this statement?

[THE STATE]: Yes.

THE COURT: Okay. Overruled.

[THE STATE]: You may answer.

[A.]: [W]hen she was talking to the officer, she stated that there was a man who . . . was in the bathroom with her and had a gun and made her pull her pants down.

[THE STATE]: Do you remember any other details that she provided the officer?

[A.]: I remember her describing the gun and I remember her describing what she did after the man left.

[THE STATE]: And can you tell that to the jury today?

[A.]: Yeah. So, she said that he made her pull her pants down and then penetrated her[.] I think he asked her for a cell phone or something, her wallet. And then he left, and she just stayed in the bathroom trying to collect herself . . .

The State then asked A. whether she recalled S. having provided any additional details regarding what had transpired while at the hospital. A. asked, "To me?" Defense counsel responded: "Yes, in your presence." A. began to answer the State's question, testifying: "She, I had asked her--" Defense counsel objected and was overruled. A. then continued:

I had asked her you know, just a couple of questions of what had happened and she said she was just going to the bathroom[,] you know[,] getting ready for work like she usually does[,] which was[,] you know[,] tuck in her shirt,

> obviously she don't wear a uniform and that's when she realized that there was somebody else that had followed her in there. And . . . I had asked her for some things and then . . . I had asked her did you know who he was or anything she said she had no idea. And she didn't feel anybody walking behind her. She had no idea there was anybody behind her. And then that's it. We didn't really talk after that, we sat quiet [sic].

Defense counsel declined to cross-examine A. The State then called Sergeant Arsenault as its next witness. The following transpired during the State's direct examination:

> [THE STATE]: And if we could return to what the victim told you about what happened that morning.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DETECTIVE ARSENAULT]: Sure. She told me that she came to work that day. She went through the front doors, the main doors in the building. She went to the first-floor bathroom and on her way to the bathroom she overheard someone say coming [sic] towards her.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DETECTIVE ARSENAULT]: She didn't acknowledge the comment, she just proceeded to the bathroom. While she was inside there, she said she observed an individual come into the bathroom and proceed to the bathroom stall that was on the right-hand side. Apparently, there's multiple stalls. Go to the right-hand side where he bent over, crouched over. At which time she said he came up and he put . . . his left arm around her throat and then put the gun to the back of her head. He made several demands.
>
> One of the things he asked for [was] her property, for possessions and she surrendered over some money. She tried to give him her cell phone, obvious [sic] didn't take the cell phone and then he tried to force her into the stall that was on the left hand side. He was trying to get the door to close. The victim

> told me the door wouldn't latch shut. He told her to pull her pants down[,] at which time she said she was fearful that she was going to be shot so she did.
>
> At that time, he pulled her pants down more. And at one point he said …, pardon my language, he said do you want [to get] fucked or do you want to get fucked up. He pulled her pants down more, at that time he penetrated her with his penis two to three times. He told her to stay in the bathroom and not to come out or else he would shoot her. And she was telling me she was scared for her life, so she didn't come out.
>
> She didn't come out I believe it was for somewhere around 10 or 15 minutes she stayed in that bathroom. He left and she eventually came out of the bathroom and just went to work. Didn't say anything to anybody until she finally felt she had to tell a supervisor, so she did and then they eventually reported up to us.

C. Analysis

1. Prior Consistent Statements

"'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 . . . must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn*, 390 Md. at 8 (quoting Md. Rule 5–802) (emphasis omitted).The first exception to the rule against hearsay on which the State relies is set forth in Maryland Rule 5–802.1, which provides, in pertinent 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:

. . .

(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. . . Md. Rule 5–802.1(b). "Provided certain prerequisites are satisfied, under Md. Rule 5–802.1(b), a witness's prior consistent statements are admissible as substantive evidence," and not merely to rehabilitate that witness's credibility. *Thomas*, 429 Md. at 96. The admission of a prior consistent statement pursuant to Rule 5–802.1(b) is acceptable where, the following requirements are met: (i) the declarant testifies at trial and is subject to cross-examination; (ii) the defense made an express or implied allegation of improper influence, motive, or fabrication; (iii) the out-of-court statement is consistent with the declarant's trial testimony; (iv) the statement was "made before the alleged fabrication or improper influence or motive arose," and (v) the statement "*logically rebut[s]* the impeachment undertaken." *Holmes v. State*, 350 Md. 412, 423–424 (1998) (emphasis retained).

Appellant does not dispute that S. testified at trial and was subject to cross-examination nor does he deny that her out-of-court remarks were uttered before any improper influence had arisen. We need only determine, therefore, whether defense counsel implicitly alleged improper influence and, if so, whether the statements at issue were consistent with S.'s testimony and logically rebutted the insinuation of undue influence.

The State claims that defense counsel implied that S. had been coached to identify "the person seated next to defense counsel" as her assailant. In support of that contention, it directs us to the following exchange:

> [DEFENSE COUNSEL]: [S.] how many times did you meet with the State's Attorney to prepare your testimony today?
>
> [S.]: To prepare? Once.
>
> [DEFENSE COUNSEL]: Okay. Well let me ask you this first. How many times did you meet with them period? [S.]: Three times.
>
> [DEFENSE COUNSEL]: And it was only one to prepare your testimony, right?
>
> [S.]: Yes.
>
> [DEFENSE COUNSEL]: *Did that preparation include identifying the person who would be sitting next to the attorneys in the case?*
>
> [S.]: No, it did not.
>
> [DEFENSE COUNSEL]: Okay. The State's Attorney never asked you before whether or not you believe you could identify the person who committed this crime according to you, right?
>
> [S.]: Yes.

(Emphasis added).

In *Craig v. State*, 76 Md. App. 250 (1988), *rev'd on other grounds*, 316 Md. 551 (1989), this Court held that counsel's questions can implicitly insinuate that a witness's testimony was coached regardless of whether the witness to whom such questions are posed denies having been thus improperly influenced. We explained:

> There is an element of discretion here, and that discretion must be exercised not just on the basis of what a cold record ultimately will show but rather on

> the basis of the trial judge's perception of what has transpired. Questions alone *can* impeach. Apart from their mere wording, through voice inflections and other mannerisms of the examiner—things that cannot be discerned from the printed record—they can insinuate; they can suggest; they can accuse; they can create an aura in the courtroom that the trial judge can sense but about which we could only speculate. The most persistent denials, even from articulate adult witnesses, may not suffice to overcome the suspicion they can engender. . .

Id. at 292 (emphasis retained).

We perceive no implied charge of improper influence in defense counsel's having asked how many times S. had met with the Assistant State's Attorney to prepare for trial. *See United States v. Beltran*, 165 F.3d 1266, 1272 (9th Cir. 1999) (Kozinski, J., concurring) ("[W]hether a witness has prepared his testimony with opposing counsel is one of the most commonly asked questions on cross. To hold that this question is equivalent to a charge of improper influence would render [Federal] Rule 801(d)(1)(B)'s requirement a nullity and open the floodgates to the admission of practically any prior consistent statement."[4]). By asking whether that preparation had included "identifying the person who would be sitting next to the attorneys in the case," however, defense counsel could have left the jury with the reasonable impression that the Assistant State's Attorney had coached S. to identify appellant as her assailant. The State was, therefore, entitled to logically rebut that implied charge with prior consistent statements. This does not, of course, end our inquiry. We must now turn to the issues of whether the hearsay was consistent with S.'s purportedly coached testimony and logically rebutted defense counsel's apparent insinuation.

[4] Federal Rule of Evidence 801(d)(1)(B) is the federal analogue to Md. Rule 5–802.1(b).

"[U]nder Md. Rule 5–802.1(b) a prior consistent statement may not be admitted to counter all forms of impeachment or to bolster the witness merely because [he or] she has been discredited." *Thomas*, 429 Md. at 102 (quotation marks and citations omitted). Rather, the Rule is only "intended to permit the admission of those prior consistent statements which would logically rebut the impeachment undertaken, whether by an implied or express charge of fabrication or of bias or improper motive." *Id*. at 103.

Our opinion in *Hajireen v. State*, 203 Md. App. 537, *cert. denied*, 429 Md. 306 (2012), is instructive in the resolution of this issue. The defendant in that case was charged with a third-degree sexual offense. At trial, the victim testified that the defendant had digitally penetrated her and averred that she had reported that fact to a social worker. Defense counsel impeached the victim's credibility by both "extensively cross-examining her about whether she told anyone that detail" and eliciting testimony from the victim's mother and an investigating officer, both of whom denied that the victim's initial statements had included an allegation of digital penetration. *Id*. at 555. The court found that the defense had both implicitly and expressly charged the victim with having fabricated the alleged incident. Accordingly, it concluded that a prior recorded statement made by the victim to the social worker (wherein the victim stated, *inter alia*, that she was unsure whether the defendant had penetrated her body) was admissible pursuant to Rule 5–802.1(b). The court reasoned:

> [T]he witness was, in my judgment, cross-examined, and it was clearly suggested to the jury that she's making up stories and has not been truthful in her recounting of the stories, either in front of the jury or on

> prior occasions, and that, as a consequence, the evidence is admissible to rebut an implied or express charge of fabrication or motive.

Id. at 548–49. Alternatively, the court ruled that the statement was admissible "as a consistent statement to diminish the child's impeachment at trial under [Maryland Rule] 5–616(c)(2)," which permits the admission of an impeached witness's prior consistent statement for the limited purpose of rehabilitating his or her credibility. *Id*. at 549.

On appeal, the defendant argued that the recorded statement had been inconsistent with the victim's trial testimony. The State responded that said remarks were consistent with key details in the victim's testimony, including her having testified that:

> [I]t happened when [appellant] was on the couch in the living room; she sat on his lap; he put his hands "in my pants"; he "sticked his hand in"; his right hand was in her pants; he rubbed her stomach with his other hand; and she was wearing pajamas and underwear and his hand went under her underwear.

Id. at 556.

Although we acknowledged that the recorded statement was largely consistent with the victim's testimony, we held that it was neither admissible for its substance under Rule 5–802.1, nor admissible to rehabilitate the victim's credibility pursuant to Rule 5–616(c)(2). The statement was clearly inadmissible under the former rule because it had not been made "prior to the time the alleged, but unexplained, bias originated." *Id*. at 554. The statement was inadmissible pursuant to Rule 5–616(c)(2) because it was neither consistent with the victim's trial testimony regarding penetration, nor did it "in any way explain, clarify, or put in perspective the inconsistency between [the victim's] trial testimony and her earlier statements, in which she made no assertion that [the defendant] penetrated her."

Id. at 557–58. We explained that, in order to be admissible pursuant to Rule 5–616(c)(2), an out-of-court statement "must meet at least the standard of showing some rebutting force beyond the mere fact that the witness had repeated on a prior occasion the statement consistent with his trial testimony." *Id*. at 557 (quotation marks and citations omitted). In other words, the mere fact that on a prior occasion a witness reported some details to which he or she later testified does not, without more, logically rebut the impeachment of his or her testimony.

Given that the statement in *Hajireen* was uttered after the alleged bias had arisen, our determination of its admissibility pursuant to Rule 5–802.1(b) did not require that we address its testimonial consistency or rebuttal value. While we recognize that *Hajireen* is not "on all fours" with the present case, the requirements of consistency and rebuttal force are no less applicable to Rule 5–802(b) than they are to Rule 5–616(c)(2). Accordingly, our reasoning in *Hajireen* applies with equal measure to the case at bar.

In this case, defense counsel's implication of improper influence was limited to S.'s in-court identification of appellant as her assailant. Given that the hearsay statements at issue did not address S.'s description or identification of her attacker, they were neither consistent with her in-court identification nor did they logically rebut defense counsel's implicit impeachment thereof. Accordingly, those remarks were not admissible as prior consistent statements pursuant to Maryland Rule 5–802.1(b).

2. Harmless Error

A. Sergeant Arsenault's Testimony

The State maintains that the admission of Detective Arsenault's testimony, if erroneous, was harmless beyond a reasonable doubt, arguing that it did not "directly bear" on the defense theory of misidentification. Relying on our opinion in *McCray v. State*, 122 Md. App. 598 (1998), appellant claims that the erroneous admission of that testimony prejudiced appellant by bolstering S.'s credibility.

"[E]rror in admitting . . . hearsay is subject to a harmless error review.'" *Frobouck v. State*, 212 Md. App. 262, 284 (quoting *Webster*, 151 Md. App. at 553), *cert. denied*, 434 Md. 313 (2013). "In conducting such an analysis . . . we . . . conduct a thorough review of the record to determine whether we are able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Harrod v. State*, 423 Md. 24, 40 (2011) (quotation marks and citation omitted). "To prevail in a harmless error analysis, the beneficiary of the alleged error must satisfy the appellate court 'that there is no reasonable possibility that the evidence complained of . . . may have contributed to the rendition of the guilty verdict.'" *Frobouck*, 212 Md. App. at 284 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

In *McCray*, the trial court admitted the testimony of Diane Burgess (the mother of Tawanna Howell, the defendant's accomplice-turned-State's-witness), to whom Howell had described a murder in which the defendant and she had participated. The court admitted that testimony pursuant to Rule 5–802.1(b), as a prior consistent statement to rebut an allegation that Howell's testimony had been fabricated. On appeal, we held that Ms. Burgess's hearsay testimony had been erroneously admitted because Howell's motive to

lie had arisen prior to her making the hearsay statement at issue. We further rejected the State's contention that "the error was harmless . . . because the same evidence had been placed before the jury during Howell's own testimony." *Id*. at 610. We explained:

> By allowing Ms. Burgess to testify about Howell's prior consistent statements, the State impermissibly bolstered Howell's credibility.
>
> . . .
>
> [W]hen the State's case depends virtually exclusively on the credibility of a witness, as in this case, the bolstering of the witness's credibility by prior consistent statements cannot be harmless error . . .

Id. at 610–11 (citation and footnote omitted).

Appellant's reliance on *McCray* is misplaced. As a preliminary matter, *McCray* does not, as appellant suggests, stand for the proposition that erroneously admitted cumulative testimony is necessarily prejudicial. Indeed, such a bright line rule would run afoul of long-standing precedent. *See, e.g., Yates v. State*, 429 Md. 112, 120 (2012) ("[W]e will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses." (citations omitted)); *Grandison v. State*, 341 Md. 175, 218–19 (1995); *Jones v. State*, 310 Md. 569, 589 (1987) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." (citations omitted)).

McCray is readily distinguishable from the present case. First, as addressed above, appellant did not suggest that S.'s description of the *corpus delicti* had been fabricated or

improperly influenced. He merely suggested that her identification, which Detective Arsenault did not testify about, had been improperly influenced. In fact, S.'s narrative of the *corpus delicti* of the crime was uncontested throughout trial. Moreover, while the out-of-court statement in *McCray* "was made after [Howell's] motive to lie arose," *id.* at 608, S.'s pre-trial statements were made before the alleged improper influence and did not, therefore, pose a similar risk of having been fabricated. Also, in contrast to *McCray*, the State's case did not rest exclusively on S.'s credibility. Rather, her identification of appellant as her assailant was corroborated by DNA evidence. Finally, as we shall discuss in greater detail below, the hearsay at issue was almost entirely cumulative of both S.'s in-court testimony and properly admitted statements she had made to Dr. Scafide mere hours after the assault. On these facts, therefore, the court's error in admitting Sergeant Arsenault's testimony was harmless beyond a reasonable doubt.

B. A's Purported Prompt Complaint

The State concedes that Detective Arsenault's testimony constituted a "'substantive description of the assault,' corroborating [S.'s] 'entire narrative of events,' and was therefore inadmissible" as a prompt complaint of sexual assault. It maintains, however, that A.'s testimony "related basic details of the crime," and was, therefore, admissible pursuant to Maryland Rule 5–802.1(d). Alternatively, the State argues that any error in admitting A.'s testimony was harmless because it "did not directly bear on [appellant's] defense theory" of misidentification. Appellant, in turn, contends that A.'s testimony recounted S.'s

"entire account of the rape," and therefore exceeded the scope of the prompt report exception.

In addition to permitting the admission of prior consistent statements, Rule 5–802.1 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:
>
> . . .
>
> (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 . . .

Md. Rule 5–802.1(d). The prompt complaint exception to the hearsay rule is subject to the following limitations:

> 1) the requirement that the victim actually testify; 2) the timeliness of the complaint; and 3) the extent to which the references may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail.

Cole v. State, 83 Md. App. 279, 289, *cert. denied*, 321 Md. 68 (1990). "The purpose of the exception is fulfilled by allowing the State to introduce, in its case-in-chief, the basics of the complaint, *i.e.*, the time, date, crime, and identity of the perpetrator." *Muhammad v. State*, 223 Md. App. 255, 268 (2015) (citations omitted), *cert. denied*, 454 Md. 666 (2017). However, "[t]he narrative details of the complaint are not admissible, as they exceed the limited corroborative scope of the exception." *Id*. (citations omitted).

Assuming, without deciding, that A.'s testimony exceeded the scope of the prompt report exception to the hearsay rule, any error in its admission was harmless. In so far as

that testimony arguably exceeded the scope of the prompt complaint exception, it addressed neither the *corpus delicti* of the assault nor the identity of the assailant. The likelihood that the jury's verdict was swayed by A.'s having testified, for example, that S. had removed her coat and styled her hair prior to the assault is so remote as to strain credulity. We are unpersuaded that this and other ancillary facts could reasonably have so muddled the minds of the jurors as to have tipped the scales of justice to appellant's detriment.

II. The Narrative Report

A. The Parties' Contentions

Appellant contends that the circuit court erred by declining to redact excerpts from a "Narrative Medical History of Assault" prepared by Dr. Scafide ("the Narrative Report"), arguing that they contained inadmissible hearsay. In so doing, he argues that "the [N]arrative [Report] included statements not admissible as … statements for the purpose of medical diagnosis and treatment." The State counters that "[a] detailed description of the circumstances of the rape was pathologically germane, as it was necessary to ensure that Dr. Scafide received all information necessary to determining the proper course of treatment and what follow-up treatment might be necessary."

B. Background

On March 5, 2019, appellant moved *in limine* to exclude excerpts of the Narrative Report, which in its entirety read:

> 18yoF report[s] vaginal sexual assault by a stranger at about 10am on 12/7/2010 at her place of employment. The patient works in the dining room at[a Gaithersburg retirement community]. At around 10am, she walked into the women's bathroom at work. She faced the mirror, removed her gloves,

> and was about to remove her coat when an unknown man entered the bathroom and walked into a stall. The patient went to leave when he grabbed her around the neck from behind (patient demonstrated). She stated that he was not strangling her, that it "was not that tight, just to hold me back". The patient states, "He put a gun to my head. He said, 'Be quiet.' He made me go into the other stall. He told me not to turn around, face the wall, and bend over." He told her to unbutton her pants. She said 'No.' "He whispered something in my ear. He said either 'Do you wanna get fucked up or fucked now.' He told me to pull my pants down, so I did. He unzipped his pants." She reports that he licked his hand and wiped it on her external genital area. He did not digitally penetrate her. The patient then reports that he penetrated her with his penis. "He did it about 3 times I think." She clarified that he put his penis in her vagina a total of three times. He penetrated her vaginally twice initially. "He told me to face him but don't look at him. He said, 'Turn around and suck his dick." The patient had turned around but did not look at his face. She saw his penis with no condom present. "I said no. He said 'turn around' again." She reports he penetrated her again vaginally with his penis for the 3rd time. The patient then reported, "He said stay in the position I was, keep bending over, and face the wall. He zipped up his pants. He pressured the gun to my head even more." She reports that he said, "Stay there. Don't come out or I'll shoot." He then walked out. She describes the gun as grey with black sides and says it does not appear like a revolver. She is unsure if he ejaculated. The patient denies any pain or bleeding during or after the vaginal penetration. The patient denies fondling or oral contact with her breasts, cunnilingus, fellatio, anal penetration, digital penetration, or any other oral contact (e.g., kissing). The patient's last sexual intercourse was in August 2010.

At a hearing on appellant's motion, the State conceded that the description of the firearm constituted inadmissible hearsay but maintained that the remainder of the Narrative Report was admissible both as a statement for purposes of medical treatment and as a prompt complaint of sexual assault. Defense counsel, in turn, contested the admissibility of the Narrative Report as a statement for purposes of medical treatment, arguing that its content and form suggested that it had been the "product of questioning" rather than "a spontaneously made statement for the purpose of obtaining medical treatment." He also

asserted that the degree of detail in Narrative Report exceeded that permitted by the prompt complaint exception. The court found defense counsel's interpretation of the prompt complain exception to have been too narrow. Accordingly, although it excluded the description of the gun, the court otherwise denied appellant's motion *in limine*.

On direct examination the following day, Dr. Scafide explained the purpose and scope of a forensic medical examination, testifying:

> [T]he first, most important part is to collect a medical history from the patient and to perform a medical examination. Because the most important part of the entire exam is to assess for injuries that need treatment or any referral for additional evolution related to any medical conditions. And to treat the patient for any conditions . . . such as sexually transmitted diseases that they may or may not be at risk for.
>
> So that is the first important part of the forensic nursing exam. Secondarily . . . during the examination process we do collect evidence if it's warranted.

After S.'s December 7th medical records and the Narrative Report contained therein had been authenticated, the State offered them into evidence. In so doing, it again acknowledged the need to redact S.'s description of the handgun. Defense counsel, in turn, objected to the admission of "the statements . . . about the details of the sexual assault." During an ensuing bench conference, the court opined that the Narrative Report contained "a fair amount of detail . . . that . . . needs to be redacted." The court proceeded to read the Narrative Report word for word and tentatively ruled that some excerpts were admissible pursuant to the prompt report exception, others were admissible as statements for purposes of medical treatment, while still others constituted inadmissible hearsay. The court then invited the State to respond to its preliminary ruling. The State maintained that, with the

exception of the description of the handgun, the Narrative Report was admissible as, *inter alia*, a statement for purposes of medical treatment pursuant to Rule 5–803(b)(4) and to rebut an implied charge of improper influence pursuant to Rule 5–802.1(b).[5] The court deferred ruling on defense counsel's objection until the following day.

After hearing Dr. Scafide's testimony and the close of all the evidence, the court reverted to its initial ruling, stating:

> I am going to go back to my original ruling. I think that the reference to the gun does not fit with any of the arguable three exceptions that were raised by the state on medical treatment, prompt reporting, or inconsistent statement.
>
> . . .
> The gun, I think, does not fit within any exception. I think the rest of the statement does with the arguable exception of some of the things that I was parsing out yesterday.
>
> But looking back at the statement and thinking about it? Those are all very peripheral details to the thrust of the report, number one[.] And number two, there is no dispute in this case about the occurrence of the sexual assault.
>
> And I think that being the case, . . . it just adds to the information that the nurse had and does not need to be parsed out as though this were a case where there are dispute, well, did it happen on this day or that day? Was . . . it consensual or not?
>
> And I think that puts a different gloss on it, and that it's meaningless in essence to pull out things like well, she was taking off her coat and that's not necessary for the report, or other minute details. So that's why the rest of the

[5] The State further contended that the excerpts of the Narrative Report were admissible as the facts forming the basis for Dr. Scafide's expert medical opinion and as a prompt report of sexually assaultive behavior. On appeal, however, the State pursues neither such theory of admissibility.

> statement will come in, which is the original ruling that I had other than the gun.[6]

C. Analysis

Maryland Rule 5–803(b)(4) excepts from the Rule Against Hearsay "[s]tatements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment." "The rationale underlying this particular exception is that 'the patient's statements to his [or her] doctor are apt to be sincere when made with an awareness that the quality and success of the treatment may largely depend on the accuracy of the information provided the physician.'" *State v. Coates*, 405 Md. 131, 142 (2008) (quoting *Candella v. Subsequent Injury Fund*, 277 Md. 120, 124 (1976)). Consistent with that rationale, statements to which this hearsay exception applies must be "both taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes[.]" *Webster v. State*, 151 Md. App. 527, 537 (2003).

[6] Although the court appears to have admitted the Narrative Report pursuant to the prompt complaint exception, our review is not limited to that ground for admissibility. *See Cassidy v. State*, 74 Md. App. 1, 19 ("It would be quite possible, of course, for a ruling on admissibility to be sustained on one ground even if the trial court had rested its decision on a very different ground. A ruling may be right for the wrong reason."), *cert. denied*, 312 Md. 602 (1988), *superseded on other grounds by Walker v. State*, 107 Md. App. 502 (1995).

As we noted in *Webster*, Rule 5–803(b)(4) is subject to a possible exception when a sexual assault victim's statement was elicited for the dual purposes of medical treatment and forensic investigation. We explained that the rationale underlying the medical treatment exception remains applicable "when a hospital nurse trained in both emergency care and sexual assault forensic examination treats and forensically examines a child immediately following a sexual assault, and in doing so solicits a description of the incident." *Id.* at 546. In such circumstances, we reasoned, "what happened to a sexual assault victim may be critically important in deciding where to examine her, what range of medical problems to look for, and, ultimately, how to treat her." *Id*.

As Dr. Scafide's testimony made indelibly clear, the principal purpose of the examination was to treat S. for any injuries or medical conditions arising from the assault. As quoted above, Dr. Scafide testified:

> [T]he first, most important part is to collect a medical history from the patient and to perform a medical examination. Because *the most important part of the entire exam is to assess for injuries that need treatment or any referral for additional evolution related to any medical conditions. And to treat the patient for any conditions … such as sexually transmitted diseases that they may or may not be at risk for*.
>
> So that is the first important part of the forensic nursing exam. Secondarily … during the examination process we do collect evidence if it's warranted.

(Emphasis added). Dr. Scafide's testimony further reflects her having conveyed the pathologic purpose of the examination to S. To that effect, Dr. Scafide testified:

> I explained to [S.] the process involved me first collecting a medical history from her, going through her medical conditions, surgical history, and the also

> sexual history and recent sexual history[.] And then going into discussion related to the incident that brought her into the emergency room.

Many of the facts set forth in the Narrative Report were unquestionably germane to S.'s diagnosis and treatment. The nature and extent of her physical contact with the assailant (sexual or otherwise) were clearly relevant to the nature and severity of her injuries, as was S.'s physical position at the time of the assault. *See State v. Woods*, 23 P.3d 1046, 1070 (Wash. 2001) (en banc) ("[W]e believe … that it appears reasonably pertinent to [the victim's] treatment that her medical providers be apprised of the physical position she was in at the time when her attack occurred."). The issues of condom use, and ejaculation were, in turn, clearly germane to the diagnosis and treatment of sexually transmitted diseases and the prescription of emergency contraception.

While we do not hold that the medical treatment exception applies to every peripheral detail purportedly relayed in contemplation of medical treatment, the facts recounted in this case permitted Dr. Scafide's to make an informed decision regarding the most appropriate course of treatment. To what limited extent the Narrative Report included arguably pathologically irrelevant information (*e.g.*, that upon entering the restroom, S. "faced the mirror, removed her gloves, and was about to remove her coat"), they pertained neither to the *corpus delicti* of the crime nor to the criminal agency of appellant. They were, moreover, cumulative of S.'s trial testimony and did not remotely malign appellant's defense of mistaken identity. Accordingly, any error in admitting such hearsay was harmless.

For the foregoing reasons, we affirm the judgments of the circuit court.

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