UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1796

September Term, 2014

EZRA PORTER

v.

STATE OF MARYLAND

Wright,
Graeff,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: November 30, 2015

A jury in the Circuit Court for Prince George's County convicted Ezra Porter, appellant, of second-degree sexual offense (Count 2), third-degree sexual offense (Count 3), fourth-degree sexual offense (Count 4), and second-degree assault (Count 5).[1] Porter was sentenced to twenty years' incarceration on Count 2, with all but ten years suspended, and the remaining convictions were merged. Porter appealed and presents the following questions for our review, which we rephrase and re-order:[2]

1. Did the trial court abuse its discretion in restricting defense counsel's redirect examination of Porter on the grounds that defense counsel's questions were beyond the scope of cross-examination?

2. Did the trial court abuse its discretion in refusing to ask, at Porter's request, if any prospective jurors had been the victim of sexual abuse or other violent crime?

[1] Porter was acquitted on Count 1, first-degree sexual offense.

[2] Porter phrased the questions as:

1. Did the circuit court abuse its discretion in failing to ask prospective jurors a *voir dire* question designed to reveal juror bias directly related to the crime?

2. Did the circuit court abuse its discretion in excluding evidence that Mr. Porter's daughter had special needs where he was accused of sexually assaulting a woman with special needs?

3. Did the circuit court abuse its discretion in unduly restricting re-direct examination and thereby excluding evidence that Mr. Porter reported the malfunction of the GPS system in his Metro Access van by completing a checklist after his shift?

4. As no verdicts were taken on Counts 3-5, third-degree sexual offense, fourth-degree sexual offense and second-degree assault, respectively, should the docket entries and other documents in the record be corrected to reflect no convictions for these three offenses?

3. Did the trial court err in excluding evidence that Porter's daughter had special needs?

4. Should the docket entries and other related documents be amended to strike Porter's convictions on Counts 3, 4, and 5 based on Porter's claim that no verdicts were taken on these counts?

For the following reasons, we answer question 1 in the affirmative and reverse the judgment of the circuit court. We will also address questions 2, 3, and 4, as these issues may arise on re-trial.

BACKGROUND

In April of 2013, Lorraine S.[3] boarded a Metro Access bus on her way home from work.[4] The bus was being driven by Porter, who was the scheduled driver but had not previously served as a Metro Access driver for Ms. S. Porter proceeded to take Ms. S. to her home, but on the way he made an unscheduled stop in a residential neighborhood just off the main highway. Porter claimed that he made this stop because the GPS in the bus malfunctioned, so he parked the bus in order to reboot the GPS and determine the best route to Ms. S.'s home. Ms. S. was the only passenger on the bus at the time.

Ms. S. testified that, while the bus was stopped, Porter got out of his seat, walked to where Ms. S. was sitting, and told her to pull her pants down. Under threat of assault, Ms. S. complied. Porter proceeded to forcibly perform oral sex on Ms. S., who tried to push Porter's head away. Ms. S. told Porter that she wanted to go home, and Porter got

[3] As Lorraine S. is a victim of a sexual assault, we will not use her full name nor that of a close relative.

[4] "Metro Access" is a door-to-door transit service for people who are unable to use public transportation due to disability.

back in his seat and drove Ms. S. to her house. When she got home, Ms. S. called her sister, Jackie R., and reported the incident to her. Ms. R. testified that Ms. S., who lives with Ms. R. and is mentally retarded, was hysterical.

When she returned home, Ms. R. called the police and escorted Ms. S. to the hospital. Ms. S. reported the incident to both the police and a nurse examiner, who conducted a sexual assault forensic exam. The nurse examiner testified that Ms. S. did not present with any noticeable physical trauma, and a laboratory analyst testified that no physical evidence was uncovered linking Porter to the assault. Porter adamantly denied having sexually assaulted Ms. S.

Additional facts will be supplied below.

DISCUSSION

I. Restriction of Defense Counsel's Redirect

When he was interviewed by the police and when he testified at trial, Porter maintained that the GPS in the Metro Access van malfunctioned, which was the reason he made the unscheduled stop. During its cross-examination of Porter, the State asked whether Porter had reported the malfunction to anyone:

[PROSECUTOR]:	. . . So you're [stopped] for three minutes. So you called a supervisor to tell a supervisor that the equipment wasn't working during that time? Did you call anyone?
[PORTER]:	No, we don't have to.
[PROSECUTOR]:	I just asked if you called. During that time did you tell [Ms. S.] that the equipment was down?
[PORTER]:	Yes, I did.

[PROSECUTOR]: You told [Ms. S.] the equipment wasn't working?

[PORTER]: Yes.

[PROSECUTOR]: Okay. **And when you got back to the office, when you finished your route, you told someone that the equipment wasn't working in that van as well?**

[PORTER]: **You write a checklist on your –**

THE COURT: **That's not the question.**

[PORTER]: Sir?

THE COURT: That wasn't the question that [the prosecutor] asked you. **Repeat the question.**

[PROSECUTOR]: Yes, Your Honor. **When you went back to the office after you completed your schedule, you told someone in the office that the equipment was not working?**

[PORTER]: **No, I didn't tell no one in the office.**

[PROSECUTOR]: Okay. It wasn't until you met with Detective Cooper when you were interviewed, Detective Cooper told you about the allegations, told you what [Ms. S.] said happened, you told Detective Cooper, at that point, your equipment was not working; isn't that true?

[PORTER]: I told her everything that transpired. Not before then. I told her everything that transpired.

[PROSECUTOR]: You told her everything that transpired?

[PORTER]: Yes.

[PROSECUTOR]: But the question is: When Detective Cooper told you what happened, told you the allegations, you told Detective Cooper your equipment was not working; isn't that true?

* * *

[PORTER]: I don't recall it like that. It seemed like – it's like you're saying I told her afterwards, then that the equipment was not – no, I told her everything that

happened and prior to, not after she told me the allegations.

(Emphasis added).

During defense counsel's redirect of Porter, the following exchange occurred:

[DEFENSE]: is it unusual for the [GPS to malfunction] for a few minutes?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Basis?

[PROSECUTOR]: Beyond the scope.

THE COURT: Sustained.

[DEFENSE]: **You indicated – you were about to indicate when you went back, there was some reference to a checklist?**

[PORTER]: **Yes.**

[DEFENSE]: **When you – what were you referring to when you said "checklist?"**

[PORTER]: **Check offs.**

[PROSECUTOR]: **Objection**, Your Honor.

THE COURT: Basis?

[PROSECUTOR]: I don't believe he completed that answer. You asked him to redirect himself to answer my question at that point.

THE COURT: **What is your objection? What is the basis for your objection?**

[PROSECUTOR]: **That it's beyond the scope of anything that we talked about on cross-examination,** Your Honor.

[DEFENSE]: If I could be heard. The question was did he report this to anybody.

THE COURT: You can come up.

(Whereupon, counsel and the defendant approached the bench.)

THE COURT: Yes. All right.

[PROSECUTOR]: My argument is it's beyond the scope. When he attempted to give that response, you then directed him and said he was not answering my question at that point. You asked me to ask the question again.

[DEFENSE]: It was a very direct question. Did you report this to anybody, and what he was trying to say was no, there was a checklist.

THE COURT: What is the question that you are proposing to ask him?

[DEFENSE]: I want to find out what --

THE COURT: No. **What's the question that you are asking the witness?**

[DEFENSE]: **Did you prepare a checklist after you – after this assignment?**

THE COURT: **Sustained. It's beyond the scope.**

* * *

[DEFENSE]: **What I want to be able to establish is that apparently, he tried to notify somebody about this. The question was: Did he notify a person? If there was a checklist that was used at that time, that would be a matter of doing that. And my argument is that it's not beyond the scope.** It's a clarification, frankly. It's not beyond the scope. I could ask it more generally if you'd like, but that's my rationale, Your Honor.

THE COURT: It's disagreed.

(Emphasis added).

There appears to be two questions posed by defense counsel that the trial court ruled were "beyond the scope" and that serve as the basis for this appeal: the first being

whether it was unusual for the GPS to malfunction, and the second being whether Porter prepared a checklist at the end of his shift.

Porter argues that the trial court abused its discretion in restricting defense counsel's redirect of Porter, thereby excluding evidence that it was not unusual for the GPS to malfunction, and that Porter did report the malfunction to someone after his shift. Porter contends that these lines of questioning were permissible because the State specifically asked Porter why he did not report the malfunction, either when he initially made the unscheduled stop or when he completed his shift. For this reason, Porter argues, his two questions were squarely within the scope of the State's cross-examination.

The State responds that neither issue was preserved for review because defense counsel failed to make adequate proffers on the record. The State also argues that, if preserved, the trial court was within its discretion in ruling that defense counsel's inquiries were beyond the scope of the State's cross-examination. We agree with the State that defense counsel's proffer, as to the unusualness of the malfunction was inadequate, yet we hold that defense counsel's proffer, with regard to Porter's reporting of the malfunction was adequate, and thus properly preserved.

Under Md. Rule 5-103(a)(2), appellate error may not be predicated upon a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." As such, "[a] claim that the exclusion of evidence constitutes reversible error is generally not preserved for appellate review absent a formal proffer of the contents and

materiality of the excluded testimony." *Muhammad v. State,* 177 Md. App. 188, 281 (2007) (citations omitted).

As to the question regarding the unusualness of the GPS malfunction, the only thing clear from the record is that defense counsel posed the question; there is nothing in the record to suggest what Porter's answer would have been. Consequently, we are unable to discern from the record the nature and extent of the evidence that Porter was seeking to introduce. *See Merzbacher v. State,* 346 Md. 391, 445 (1997) (When evaluating the adequacy of a defendant's proffer, "we are in no position as an appellate court to discern what the answer may have been, whether favorable or unfavorable to the defense."). Furthermore, even if we were able to decipher what Porter's answer would have been, the record is devoid of any indication as to why this information was relevant to any material issue. *See Bruce v. State,* 328 Md. 594, 626 (1992) ("A party must clearly proffer his theory [of admissibility] to the trial court in order to challenge on appeal the sustaining of objections to those questions.") (citations omitted). For these reasons, we hold that any alleged error by the trial court regarding this evidence was not properly preserved.

Conversely, defense counsel did make a valid proffer as to the contents and materiality of the second question under review. When responding to the State's question of whether he told someone at the end of his shift about the malfunction, Porter answered, "You write a checklist," implying that it was customary to complete a checklist at the end of a shift. After the trial court prevented Porter from expanding on this answer during redirect, defense counsel explained to the court that Porter "tried to

notify somebody about [the malfunction]" and that the checklist was the means for so doing. Defense counsel further explained that this line of questioning was in direct response to the State's implication that Porter did not report the malfunction to anyone until after the police informed him of the allegations made by Ms. S. Therefore, even if defense counsel failed to make a by-the-book proffer, which is what the State contends, the record provides enough information to overcome the threshold of Md. Rule 5-103(a)(2). *See Peregoy v. Western Md. Ry. Co.,* 202 Md. 203, 209 (1953) (Even when a party fails to proffer on the record, appellate review is appropriate "where the tenor of the questions and the replies they were designed to elicit is clear[.]").

Having established that an appropriate proffer was made, we now address Porter's contention that the trial court abused its discretion in refusing to allow Porter to present evidence that he completed a checklist as a means of reporting the GPS malfunction. On this issue we agree with Porter.

A trial court's authority regarding the admission of evidence is generally reviewed under an abuse of discretion standard. *See Hopkins v. State,* 352 Md. 146, 158 (1998). A trial court's decision to limit the scope of matters presented during redirect examination is no different, and "no error will be recognized unless there is clear abuse of such discretion." *Oken v. State,* 327 Md. 628, 669 (1992) (citation omitted). Trial courts are afforded great deference in making decisions, subject to the abuse of discretion standard, provided such decisions are "exercised to the necessary end of awarding justice and based upon reason and law[.]" *Saltzgaver v. Saltzgaver,* 182 Md. 624, 635 (1944). No abuse of discretion will be found unless the trial court's actions are "well removed from

any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North,* 102 Md. App. 1, 14 (1994).

Under the Maryland Rules, a trial court is empowered with general control over the mode and order of interrogating witnesses and presenting evidence; however, the Rules do not specifically address a court's authority over redirect examination. *See* Md. Rule 5-611(a). Likewise, the Maryland Rules allow a court to limit the scope of cross-examination to matters brought up during direct examination and issues of credibility, but no mention is made as to whether these same limitations apply to the scope of redirect examination. *See* Md. Rule 5-611(b). Moreover, "[t]here appears to be a dearth of Maryland case law discussing the right of redirect [examination.]" *Thurman v. State,* 211 Md. App. 455, 468 (2013) (footnote omitted).

Despite the apparent lack of promulgated authority regarding redirect examination, this Court has held that the rules governing the scope of cross-examination are equally applicable to the scope of redirect examination. *See, e.g., id.* at 470 (discussing the scope of redirect examination as being limited to new matters brought up during cross-examination); *Tirado v. State,* 95 Md. App. 536, 552-53 (1993) (evidence on redirect was properly admitted because the defendant "opened the door" during cross-examination); *Van Meter v. State,* 30 Md. App. 406, 422 (1976) (line of questions on redirect were proper because they were "directly aimed at rehabilitating the witness from appellant's assault on cross-examination."). And, just like during cross-examination, a trial judge's discretion regarding the scope of redirect examination is wide, and trial courts are generally permitted to exceed the normal restrictions.

For example, in *Bailey v. State*, 16 Md. App. 83 (1972), the trial court permitted the prosecution, on redirect, to readdress testimony that had already been covered on direct examination and to elicit testimony that went beyond the scope of cross-examination. *Id.* at 110-11. We found both decisions by the trial court to be proper:

> The trial judge's discretion in permitting inquiry on redirect examination is wide, particularly where the inquiry is directed toward developing facts made relevant during cross-examination or explaining away discrediting facts. That the [prosecutor] . . . attempted to shore up his strong points and to clear away ambiguities created by the cross-examination was simply a sound trial tactic . . . . [Furthermore,] not only is the control of redirect examination within the sound discretion of the trial judge, but he would be permitted to go so far as to allow the State to reopen its case, after it had been closed[.]

Id.

Similarly, in *Bernos v. State,* 10 Md. App. 184, 188 (1970), we held that the trial court did not abuse its discretion in permitting the prosecution, on redirect, to question a police officer about a police report that contained inadmissible statements made by the defendant. In that case, the defendant had questioned the officer about certain parts of the report during cross-examination. *Id.* at 189. As a result, we saw "no harm in permitting questions on redirect examination concerning other parts of the report[.]" *Id*.

The Court of Appeals has even sanctioned the admission of other crimes by a defendant, normally inadmissible as direct evidence, to rehabilitate an impeached witness on redirect. *State v. Werner,* 302 Md. 550 (1985). In that case, the defendant was charged with committing various sex offenses against his stepdaughter. *Id.* at 552. At trial, the victim testified that the defendant had sexually abused her five years prior, but she never told anyone because she was afraid. *Id.* at 555. The Court of Appeals

ultimately held that, even though such evidence is generally inadmissible, it becomes "admissible in a criminal case to rehabilitate a State's witness once the witness has been impeached [on cross-examination.]" *Id.* at 560-61.

One consistent theme prevalent throughout the cases cited above is that both this Court and the Court of Appeals have exhibited great deference in permitting a trial court to admit evidence on redirect. On occasions when addressed, both this Court and the Court of Appeals have held that a witness should be allowed, on redirect, to explain testimony given on cross-examination and to address issues related to impeachment. These are not novel concepts; instead, they are long-standing edicts of Maryland jurisprudence. *See e.g. American Syrup & Preserving Co. v. Roberts,* 112 Md. 18 (1910) (on redirect, explanation of testimony given on cross-examination is proper); *Baltimore Belt R. Co. v. Sattler,* 100 Md. 306 (1905) (allowing a witness on re-examination the opportunity to explain some of his answers given on cross-examination was "proper and legitimate.").

As it is the tendency of trial courts to admit evidence on redirect, as well as the tendency of our appellate courts to sanction these admissions, the trial court's restrictive interpretation of a party's right to present evidence on redirect was too narrow. Porter attempted to introduce the evidence in question in direct response to a question posed by the State, and the trial court, without an objection from the State, cut him off. Although we recognize that a trial court is afforded broad discretion in the control and manner of a witness's testimony, we also recognize that if Porter was answering the State's initial question in an unresponsive manner, the State had the right to request a remedy. *See*

Beads v. State, 422 Md. 1, 15 (2011) ("The party who is questioning a witness is entitled to a ruling 'striking' a non-responsive answer[.]").

Furthermore, the State during cross-examination asked Porter if, when he returned to the office, he told "someone that the equipment wasn't working." Porter responded: "You write a checklist on your --," but he was unable to finish his answer before the trial court interjected. When the State restated the question, it asked Porter if he "told someone **in the office** that the equipment wasn't working," to which Porter responded that he did not. Therefore, the trial court's interjection led to the State changing its question from whether Porter told *anyone* about the malfunction to whether Porter told *someone in the office* about the malfunction.

Then, on redirect, defense counsel asked Porter to clarify his initial answer regarding the checklist and whether he reported the malfunction to anyone, and the trial court, without any further explanation, ruled this to be beyond the scope of cross-examination. Defense counsel then pointed out that the State asked Porter at length if he notified anyone other than the police about the malfunction. Defense counsel proffered that the checklist would be related to that line of questioning, and he even offered to rephrase the question more generally. Again the court, without any further explanation, denied defense counsel's request solely because it was "beyond the scope" of cross-examination.

In sum, not only did the trial court curtail Porter's answer to the original question without any objection from the State, but the trial court then refused to allow Porter to

expound on this answer during redirect, despite the fact that Porter's answer was within the scope of the State's cross-examination. Based on these facts, the trial court abused its discretion. There are a myriad of justifications for the trial court to have allowed this testimony, many of which we cite above, but few reasons to disallow it. Unfortunately, the trial court provided no reason at all, except that the testimony was beyond the scope of cross-examination. Such a decision, without more, was "clearly against the logic and effect of facts and inferences before the court[.]" *North,* 102 Md. App. at 13 (discussing the standard for abuse of discretion) (citations omitted).

The State nonetheless maintains that the trial court did not err because its cross-examination of Porter did not introduce new matters into evidence. The State contends that it was merely "following up" on Porter's direct testimony, in which Porter indicated that he informed the police about the malfunction:

> [DEFENSE]: Okay. When you were told about what you were being accused of during the interview, did you, at any time, explain to [the police] what had happened with the GPS?
>
> [PORTER]: Yes, I did.

The State's contention that the matter was brought up on direct-examination does not hold up to scrutiny. Defense counsel did not investigate the subject in any meaningful way, and defense counsel did not ask any other questions during direct examination that were related to this topic. At no time did defense counsel ask Porter if he had reported the issue during or immediately following his shift, nor did defense counsel ask Porter about the checklist. The State expanded upon defense counsel's direct examination, both when it questioned Porter about other individuals he did (and did not)

report the malfunction to and when it insinuated that Porter did not report the malfunction until after he was a suspect. Given the circumstances, the trial court should have permitted defense counsel to address these matters during redirect. *Daniel v. State,* 132 Md. App. 576, 583 (2000) ("[A] party is generally entitled to have his witness explain or amplify testimony that he has given on cross-examination and to explain any apparent inconsistencies.") (Citation omitted).

The State also claims that its inquiry into whether Porter did or did not report the malfunction was not an attack on his credibility, and thus there was no need for defense counsel to rehabilitate Porter on redirect. This argument, however, is directly refuted by the State's own closing argument:

> And [Porter] took the stand, and on direct examination, remember what he said? When asked, Did you touch [Ms. S.]? I definitely did not. Did you put your tongue on [Ms. S.'s] vagina? I definitely did not. That's what he told you yesterday. **Look at his credibility.** Because on cross-examination, did you see his demeanor change? . . . . I asked him, When you finished your schedule for that day, did you report to anyone to let them know that the system was not working in the van? . . . . He went back and forth and back and forth and back and forth. He said, No. He didn't report this to anybody.
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> * * *
>
> It doesn't make sense . . . . And after the allegations, [Porter] then said, the GPS wasn't working that day. It wasn't before, it was after he was told that [Ms. S.] had reported him for what he had done to her days prior. **So we have to look at his credibility.**

(Emphasis added).

From what we can discern from the record, the State's trial long strategy of impeachment warranted defense counsel's attempt to rehabilitate on redirect. *See Feeney*

v. Dolan, 35 Md. App. 538, 549-50 (1977) (trial court erred in limiting scope of redirect after plaintiff's expert witness had been impeached).

Finally, we cannot declare that the trial court's error was harmless beyond a reasonable doubt:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated.

Dorsey v. State, 276 Md. 638, 659 (1976).

Although the State presented six witnesses in its case-in-chief, most if not all of the incriminating testimony given by these witnesses revolved around what Ms. S. told them about the attack. None of the witnesses were able to independently corroborate Ms. S.'s trial testimony, other than to say that her testimony was consistent with what she told them following the attack. For the defense, the only witness to testify was Porter, who refuted Ms. S.'s version of the events and provided the only alternative explanation for why the Metro Access van was stopped (the GPS had malfunctioned). In short, the ultimate question of Porter's guilt hinged on whether the jury believed Ms. S. or Porter, a point that the State hammered home during its final words to the jury:

> If you believe [Ms. S.], if you believe what she said happened to her, you believe what she told her sister three times, if you believe what she told [the police] two times, if you believe what she told [the nurse], and if you believe what she came in here and told each one of you, then that's all the evidence that you need to find [Porter] guilty of every single crime charged in this case.

Given the determination of credibility was central to this case, and given that the excluded evidence went directly to Porter's credibility, it would be impossible for us to conclude that the trial court's error was harmless. *Id.* (An error cannot be harmless unless the reviewing court is satisfied that "there is **no reasonable possibility** that [the trial court's error] may have contributed to the rendition of the guilty verdict.") (Emphasis added). Consequently, the trial court's error mandates reversal.

II. Jury *Voir Dire* Question

Porter argues that the trial court erred in not asking the following question to prospective jurors during *voir dire*:

> Has any member of the jury panel, any member of your immediate family, or any of your close personal friends ever been the victim of sexual abuse or any other violent crime? Please stand and approach the Bench when called. At the Bench: Please indicate the nature of this crime. Would this in any affect [sic] your ability to be fair and impartial in this case?

Porter contends that any affirmative answer on the part of a prospective juror to the first question, in conjunction with an affirmative answer to the second question, would require that that juror be excused for cause. Porter argues that, as a result, the trial court's refusal to pose the question was an abuse of discretion.

The State counters that the trial court was under no obligation to ask potential jurors whether they had been the victim of a crime. The State further contends that any potential bias that may have been revealed by Porter's proposed question was addressed by the trial court via other lines of questions posed during *voir dire*. We agree with the State.

"We review the trial judge's rulings on the record of the *voir dire* process as a whole for an abuse of discretion[.]" *Stewart v. State,* 399 Md. 146, 160 (2007). "The judge's conclusions are therefore entitled to substantial deference, unless they are the product of a *voir dire* that 'is cursory, rushed, and unduly limited.'" *Id.* (quoting *White v. State,* 374 Md. 232, 241 (2003)). Furthermore, we recognize that the primary purpose of *voir dire* is to uncover impartiality or bias on the part of individual jury members; therefore, the decisions made by the trial court during *voir dire* will not be disturbed unless they "adversely affect[ed] appellant's right to a fair and impartial jury." *White,* 374 Md. at 242.

Unlike in many other jurisdictions, the process of *voir dire* in Maryland is generally limited, such that "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" *Pearson v. State,* 437 Md. 350, 356 (2014) (quoting *Washington v. State,* 425 Md. 306, 312 (2012)). Strategic tactics in jury selection, such as using preemptory challenges to sculpt a jury in one's favor, are generally inappropriate in Maryland. *Id.* at 356-57. Therefore, a trial court need ask a proposed *voir dire* question "if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification[.]'" *Id.* at 357 (quoting *Moore v. State*, 412 Md. 635, 663 (2010)).

The Court of Appeals has identified two types of inquiry suitable for uncovering a specific cause for disqualification: 1) questions designed to determine whether a prospective juror meets the minimum statutory qualifications for jury service; and 2) questions designed to discover a prospective juror's state of mind regarding any matter

reasonably likely to have undue influence over him. *Washington,* 425 Md. at 313. Moreover, "the trial court has broad discretion in the conduct of *voir dire*, most especially with regard to the scope and the form of the questions propounded[.]" *Dingle v. State,* 361 Md. 1, 13 (2000) (citation omitted).

Under these parameters, we see no reason to conclude that the trial court abused its discretion in refusing to ask Porter's *voir dire* question. An affirmative answer on the part of a juror to Porter's initial question – whether the jury member had been the victim of sexual abuse – would not uncover a specific cause for disqualification. *See, e.g., Pearson,* 437 Md. at 359 (a prospective juror's experience as a victim of a crime is not an automatic disqualification); *Perry v. State,* 344 Md. 204, 218 (1996) (being involved in a crime of violence does not disqualify a potential juror *per se*). Furthermore, this initial query does not become pertinent simply because Porter adds the follow-up question: "Would this in any way affect your ability to be fair and impartial in this case?" If this were true, then any question, no matter how remote or unrelated to the matter at hand, would become a necessary line of inquiry with the addition of a follow-up question about impartiality. Such a scenario would inevitably lead to an unduly lengthy and cumbersome jury selection process.

Moreover, the trial court in the present case had already asked the jury panel if "there [was] any member of this jury panel who possesses strong feelings about allegations of sexual assault." Twelve of the panel members answered this question in the affirmative, and the trial court questioned each of these jurors individually to determine if the reported feelings would affect the juror's ability to be impartial. During

the trial court's questioning, several of the jurors revealed that their strong feelings stemmed from the fact that they or someone they knew were the victims of sexual abuse. As a result, any additional questions about a potential juror's victimization would have been redundant because the trial court had broached the subject prior to Porter's request to have his question posed to the jury panel.

The Court of Appeals addressed this very issue in *Pearson*. In that case, the defendant wanted to ask potential jury members if they had ever been the victim of a crime, but the trial court chose instead to ask if any jury members had "strong feelings" about the crime charged. *Pearson,* 437 Md. at 360. In affirming the court's decision, the Court of Appeals held that a "'strong feelings' *voir dire* question makes the 'victim' *voir dire* question unnecessary by revealing the specific cause for disqualification at which the 'victim' *voir dire* question is aimed." *Id.* (footnote omitted). Therefore, the trial court in this case was well within its sound discretion in choosing not to ask Porter's question. *Nance v. State,* 93 Md. App. 475, 482 (1992) (a trial court need not ask an additional *voir dire* question if "the trial judge adequately covered the information elicited by the requested question").

Porter attempts to distinguish his case from *Pearson* by arguing that the *voir dire* question in this case was sufficiently narrow in scope, unlike the question in *Pearson,* which the Court held to be inappropriate because it "may consume an enormous amount of time." *Id.* at 359 (citation omitted). In *Pearson*, the question proposed was: "Have you, any member of your family, [a] friend, or [an] acquaintance been the victim of a crime?" *Id.* at 354-55. The Court held that such a question would be unduly burdensome

because "[m]any (if not most) prospective jurors have been the victims of some kind of crime." *Id.* at 360. Porter contends that his proposed question would have elicited far fewer responses, thereby eliminating the concern that an enormous amount of time would be consumed.

We find Porter's argument unconvincing. Although the Court in *Pearson* did hold that a trial court should weigh the expenditure of time and resources in determining whether to ask a certain *voir dire* question, at no time did the Court indicate that this was, by itself, dispositive. *Id.* Instead, the Court held that this was but one of three reasons why, in that case, the trial court need not ask the proposed *voir dire* question. *Id.* The other two reasons cited by the Court in *Pearson* were: 1) that victimization is not *per se* disqualifying; and 2) that a "strong feelings" *voir dire* question is a proper substitute to a question about victimization. *Id.* And, as we have already stated, these two reasons are directly applicable to the present case.

Lastly, Porter attempts to distinguish his case from *Pearson* by arguing that a potential juror's victimization in this case is more significant because Porter was charged with a crime against a victim, whereas in *Pearson* the defendant was charged with various drug-related offenses, which Porter claims are "victimless." *See id.* at 354.

Again, Porter's argument is unpersuasive. We have found no support, either in *Pearson* or in Porter's brief, for the argument that the nature of the crime is in any way determinative of the appropriateness of a *voir dire* question about a potential juror's victimization. To the contrary, several of the cases cited by the Court in *Pearson* were cases involving crimes against victims, and in each of these cases the victimization *voir*

dire question was deemed unnecessary or inappropriate. *See, e.g., Washington,* 425 Md. at 307 (rape); *Perry,* 344 Md. at 209 (murder); *Yopps v. State,* 234 Md. 216, 218 (1964) (burglary of person's home).

III. Evidence of Porter's Daughter's Special Needs

Porter argues that the trial court erred by excluding evidence that his daughter had special needs. Porter contends that this evidence went directly to motive because it made it less likely that he would assault someone with special needs.

The State argues that Porter failed to preserve the issue for appeal because defense counsel did not adequately proffer the nature of Porter's daughter's special needs or its relevancy. The State also argues that, if preserved, the evidence was nevertheless properly excluded as irrelevant. Although we disagree with the State that the issue was not properly preserved, we agree that the trial court did not err in excluding the evidence.

As we discussed above, Md. Rule 5-103(a)(2) states that appellate error may not be predicated upon a ruling excluding evidence unless an appropriate proffer is made on the record. Such a proffer requires, at a minimum, a statement on the record as to the contents and materiality of the excluded testimony. *Muhammad,* 177 Md. App. at 281.

In the present case, defense counsel attempted to elicit the evidence in question during direct examination of Porter:

[DEFENSE]: Okay. Who, in your life, do you know has special needs?

THE COURT: Hold on.

* * *

[DEFENSE]: Okay. This goes to motive.

THE COURT: Goes to what?

[DEFENSE]: Motive.

THE COURT: Well, what is your proffer as to what the answer to this question is?

[DEFENSE]: My proffer is his youngest daughter has special needs.

THE COURT: Sustained. Irrelevant.

Despite the State's assertions to the contrary, we hold that defense counsel made an appropriate proffer in conformity with Md. Rule 5-103(a)(2). Defense counsel expressly stated the contents of the excluded testimony, namely that Porter's daughter had special needs. Porter's counsel also stated that the evidence went to motive, which was a material fact in the case. *See Jenkins v. State,* 14 Md. App. 1, 6 (1971) (evidence related to motive is admissible in a criminal case). Therefore, the issue was properly preserved for our review, and we now turn to whether the trial court erred in excluding the evidence.

Generally, a trial court's decision to admit evidence will be reversed "only if the court abused its discretion." *Hopkins v. State,* 352 Md. 146, 158 (1998) (citations omitted). On the other hand, Md. Rule 5-402 "makes it clear that the trial court does not have discretion to admit irrelevant evidence." *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper,* 418 Md. 594, 620 (2011) (footnote omitted). Therefore, even though a trial court's decision to admit evidence is usually discretionary, the *de novo* standard of review is appropriate when a trial court determines that certain evidence is or is not relevant, as this is a conclusion of law. *Id.*

Porter argues that evidence of his daughter's special needs was relevant because it made it less probable that Porter would be motivated to sexually assault the victim, as the victim also has special needs. *See* Md. Rule 5-401 (defining relevant evidence as evidence having "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.").

The flaw in Porter's argument is that he presumes that having a daughter with special needs makes it less probable that he would be motivated to sexually assault the victim. There is nothing in the record to support this conclusion, and Porter cites no case law in which a court has held that having a child with special needs, by itself, was relevant to a defendant's motive in sexually assaulting someone else with special needs. *See Snyder v. State,* 361 Md. 580, 591 (2000) ("[A]n item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case[.]"). Given that we fail to see from the record how the evidence in question was relevant to any fact or matter in dispute, we hold that the trial court's decision to exclude the evidence was proper:

> [E]vidence of collateral facts, or of those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, should be excluded, for the reason that such evidence tends to divert the minds of the jury from the real point in issue, and may arouse their prejudices.

Hitzelberger v. State, 174 Md. 152, 161 (1938).

IV. The Docket Entries

Porter argues that the trial court's docket entries and related documents erroneously show Porter as having been convicted on Counts 3, 4, and 5. Porter notes that the jury failed to return a verdict in open court on these counts in violation of Md. Rule 4-327. Therefore, according to Porter, his convictions on these counts were rendered invalid. *See State v. Prue,* 414 Md. 531, 537 (2010) ("[W]hen rendering verdicts in a multicount charging document, silence by a trial judge or a jury on one count is equivalent to an acquittal on that count.").

The State concedes that no verdict was returned on these counts in open court; however, the State contends that this was unnecessary because the jury did return a verdict in open court on Count 2. Therefore, according to the State, the jury did not need to render separate verdicts on Counts 3, 4, and 5. We agree with the State.

"In the event of a discrepancy between the transcript and a docket entry, absent some independent evidence that the transcript is in error, it will prevail and, if necessary, the docket will be corrected." *Carey v. Chessie Computer Services, Inc.,* 369 Md. 741, 748 n.3 (2002) (citing *Waller v. Maryland Nat'l Bank,* 332 Md. 375 (1993)).

Porter is correct that Md. Rule 4-327 requires that a jury verdict be returned in open court, and Porter is correct that a jury's silence as to any count generally acts as an acquittal on that count. *Prue,* 414 Md. at 547. But Porter has ignored two notable exceptions to these generally held principles. The first exception is "where the absence of a verdict on a count is pursuant to the court's instructions or the directions on a verdict sheet." *Id.* at 548 (citations omitted). The second exception is "where there is a guilty

verdict on a count charging a greater offense, and silence on a count charging an offense which is lesser included[.]" *Id.* Under either exception, any docketed convictions on the counts for which the jury was silent are valid. *Id.*

In the present case, Porter was charged with four counts of sex offense and one count of assault, all stemming from the same alleged act – performing oral sex on the victim without her consent and under the threat of violence. The trial court prepared and distributed to the jury a verdict sheet in which the charges were listed in descending order of severity, from Count 1 (sexual offense in the first degree) to Count 5 (second-degree assault). Prior to deliberations, the trial court informed the jury that a guilty finding on one of the top counts was indicative of a guilty finding on any remaining counts. The court instructed:

> I indicated to you that you will have a verdict sheet. The verdict sheet lists the questions or charges that we're asking you to decide. Question number one starts with first-degree sexual offense. The options are not guilty or guilty. And depending on how you answer question one, you will either stop or you will proceed to go to question number two.

In addition, the verdict sheet contained a statement below each charge whereby the juror was instructed that, if he or she found Porter guilty, the juror was to stop. If, on the other hand, the juror found Porter not guilty on a charge, the juror was to proceed to the next charge (and so on, up to Count 4). Therefore, the jury's failure to render a verdict in open court on Count 3 (sexual offense in the third degree) and Count 4 (sexual offense in the fourth degree) was excused by the trial court's explicit instructions. *Prue,* 414 Md. at 548.

On the other hand, Count 5 contained no such instruction; there was a blank space on the verdict sheet between Count 4 and Count 5, and no instruction was given to the jury by the trial court regarding this discrepancy. Nevertheless, Count 5 remains valid under the "lesser included" exception discussed above. *Id.* at 547.

In order for a crime to be considered a lesser included offense, the elements required to convict a defendant of the lesser crime must be fully encompassed by the greater crime. *Blockburger v. U.S.,* 284 U.S. 299, 304 (1932). "If the greater offense contains all of the elements of the lesser included offense, a guilty verdict on the count charging the greater offense necessarily means that the defendant was also guilty of the lesser included offense." *Prue,* 414 Md. at 549 (citations omitted).

In the present case, Porter was convicted of sexual offense in the second degree, the elements for which include: 1) a sexual act with another; 2) by force; and 3) without the other's consent. Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 3-306. In comparison, second-degree assault merely requires intentional and unconsented offensive physical contact. CL § 3-203. These elements were satisfied when the jury found that Porter forcibly performed cunnilingus on the victim against her will, which it did when it returned a verdict of guilty on Count 2. *See Travis v. State,* 218 Md. App. 410, 421 (2014) (holding that convictions for third and fourth-degree sexual offense were enough to satisfy elements of second-degree assault). Therefore, the jury's

failure to return a verdict in open court on Count 5 did not constitute an acquittal on that charge.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED AND CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID AS FOLLOWS: 50% BY APPELLANT AND 50% BY PRINCE GEORGE'S COUNTY.