UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1502

September Term, 2014

TRAVIS LEE

v.

STATE OF MARYLAND

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*Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: January 19, 2016

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

After a trial held in the Circuit Court for Prince George's County, appellant Travis Lee was convicted of sexual abuse of a minor, five counts of second-degree sex offense, and four counts of third-degree sex offense, among other charges, relating to the abuse of his 10-year-old cousin on June 1, 2013.

The court sentenced Lee to 125 years in prison on August 8, 2014. Lee appealed on August 13, 2014, and presents four questions for our review:

I. "Did the trial court err in overruling Lee's objection and thus allowing the State to misrepresent the expert testimony concerning the DNA evidence?"

II. "Should the two convictions and sentences for second-degree sex offense based on anal and vaginal digital penetration be vacated because they are unlawful under the instructions given by the court and accepted by the State?"

III. "Does the sentence for sodomy merge into the sentence for second-degree sex offense based on anal intercourse?"

IV. "Did the trial court err in preventing Lee from asking the alleged victim's mother about a recent incident of sexual abuse of the alleged victim on the school bus for the purpose of establishing another possible source of the alleged victim's knowledge of the types of acts she alleged Lee committed against her?"

For the following reasons, with the exception of one count, we affirm the judgments of the circuit court.

BACKGROUND

Lee does not contest the sufficiency of the evidence. Accordingly, we need only recite a summary of the facts that gave rise to this prosecution, or that may be necessary

to the resolution of issues raised in this appeal. *See Martin v. State*, 165 Md. App. 189, 193 (2005) (citing *Whitney v. State,* 158 Md. App. 519, 524 (2004)).

On June 1, 2013, the victim, D.F., was staying at her father's home in Prince George's County, when Travis Lee, cousin of the victim's father, came to visit. Lee was 49 years-old at the time of the events. He arrived at the house drunk around midnight. The victim's father told Lee that he could stay over, and then went to bed. Although D.F. had her own bedroom in her father's house, she stayed up with Lee watching television in the living room on the night of the incident.

When Father awoke around 4:30 am, he saw Lee and the victim asleep on different parts of the sectional sofa. Father went back to sleep. When he awoke again between 7:30 and 8:30, he got his daughter up and ready to go to her mother's house, and Lee parted company with them.

After D.F. was dropped off at her mother's home in Baltimore, she told her mother about the abuse. D.F. said that Lee made her touch his private parts and fondled her private parts and anus. She told her mother that "Travis had sex with her." According to Mother's testimony, this is not something D.F. would say. Mother averred that her daughter had "a sad look, . . . like she did something wrong. She had a look [like] she did something bad, . . . [or that] something bad happened to her." Father and Mother immediately took their daughter to the Sinai Hospital near the mother's house in Baltimore.

At the hospital, the victim told the police that she was sitting on the couch watching cartoons when Lee came over and started touching her on her legs. Although the victim did not use the following terms, she said that Lee made oral contact with her breast and legs, and forced anal penetration with his penis and fingers. He also forced digital vaginal penetration.

Ms. Paulette Dendy, a SAFE nurse, was accepted as an expert forensic nurse.[1] She saw the victim on June 3, 2013, two days after the assault. The victim reported pain in the rectal area and vaginal area. There was swelling of the labia and a tear in the rectum, both indicative of trauma. The forensic nurse took an oral swab, took an external anal/perianal swab, and prepared a sexual assault kit.

Detective Jennifer Rio of the Prince George's County police department sex abuse unit obtained an arrest warrant for Lee after she met with the victim and her parents on June 3rd. Lee was indicted on several counts of sexual offense in the second- and third-degree, rape, sodomy, assault, and child abuse, and a trial was held on May 28 and 29, 2014. D.F. and her mother and father testified to the above events at trial, where D.F. specifically identified her abuser as "Cousin Travis." She also indicated that Lee made oral contact with her vagina and anus. Mother testified that D.F. was developmentally delayed by about two years. She characterized her daughter as autistic, meaning that she

[1] SAFE is an acronym for sexual assault forensic examination—a type of forensic examination that collects potential biological evidence on the victim's body. SAFE nurses also document any injuries and bruises that the victim may have experienced.

lacked socialization skills and that her ability to express herself was not at the normal level for a child her age.

Ms. Nicole Miulli was accepted as an expert in serology and testified that the victim's anal swab was positive for sperm. The serologist confirmed the positive result with a visual microscope test, which indicated the presence of approximately two sperm.[2] She testified that the length of time that sperm stays around depends on if the victim washes, wipes, or used the bathroom "and how many days it's been since the exam was completed."[3] Ms. Miulli stated that there was no other useful evidence from the other swabs taken during the sexual assault forensic examination. The serologist then sent the anal swab for DNA analysis along with swabs from the victim and Lee for comparison.

Ms. Christina Tran, an expert in forensic DNA analysis, tested the swabs and reported results for two different cell types: epithelial cells and sperm cells. Ms. Tran testified that the epithelial fraction of the DNA from the anal swab was consistent with the victim's DNA. Lee was excluded as a contributor to this portion of the sample.[4] With respect to the sperm fraction, the DNA was again consistent with the victim, and

[2] Preliminary analysis of the vaginal swab indicated the presence of seminal fluid; however, when Ms. Miulli conducted further testing, neither sperm nor seminal fluid was found in the sample.

[3] Nurse Dendy testified that D.F. had bathed, defecated, and wiped several times between the date of the incident and date of the SAFE examination.

[4] Ms. Tran described the DNA profile terminology as follows: "Included means that it's possible [a person] could have contributed to the sample. Excluded means that [a person] could not have contributed to that sample. . . . When you say inclusion or exclusion it's based off of the DNA profile that we obtained for that particular sample."

Lee was again excluded as a contributor to the DNA profile that Ms. Tran obtained. She stated that she found no male contributor for either of the two samples. When questioned about this discrepancy—i.e. how the tests could indicate a female contributor to sperm DNA—Ms. Tran said that it was possible there was so much epithelial DNA from the victim in the sample that it masked any other DNA.

Lee moved for judgment of acquittal on count two – second-degree rape, which was granted. The judge then instructed the jury, and, after approximately 30 minutes of deliberation, the jury returned guilty verdicts on all counts. On August 8, 2014, Lee was sentenced to 125 years imprisonment.[5] Lee appealed to this Court on August 13, 2014.

Additional facts will be discussed as necessary.

DISCUSSION

I. Characterization of DNA Evidence During Closing Argument

At trial, the DNA analyst, Ms. Tran, testified as follows:

[5] The court sentenced Lee as follows:

Count 1: Sex abuse of a minor: 25 years

Counts 3-7: Second-degree sex offense: 20 years, consecutive

Counts 8-11: Third-degree sex offense: merged with Counts 3,4,5,6 and 7

Count 12: Sodomy: 10 years, concurrent to Count 3

Count 13: Fourth-degree sex offense: merged with Counts 3,4,5,6 and 7

Count 14: Second-degree assault: merged with Counts 3,4,5,6 and 7

The above sentence reflects a September 4, 2014, order issued by the court, replacing one concurrent 20-year sentence for second-degree sex offense with a merged count of third degree sex offense.

[STATE]: How is it possible that you got her profile from the sperm fraction?

[MS. TRAN]: It's possible because sometimes there could be so much **epithelia cells that it carried over to that sperm fraction that it's masking any possible male DNA that was present, it's just going to mask it**.

Q So when you say the Defendant was excluded was it because it wasn't him or why?

A **He is excluded because based on the *DNA profile that I obtained* from that particular sample, he could not have been a possible contributor to that *DNA profile* that I obtained.**

Q Was there enough of a sample to test to get a profile?

* * *

A Yes, because I did obtain a profile for that particular sample.

Q Well, were you able to get a profile for the Defendant for any male contributor?

A No male contributor for either of those two samples.

Q But why?

[DEFENSE]: Objection. She explained that.

THE COURT: Well, not quite yet. Why couldn't you get a profile for any male?

THE WITNESS: Because, again, it's possible that there were so much epithelia cells there, it is masking what little DNA that could have been there. Because again, during serology, sperm is noted. I do perform the differential extraction. And that is a method in which it is an attempt to separate sperm versus epithelia cells. It's not 100 percent exact science. It's an attempt to separate sperm versus epithelia.

BY [THE STATE]:

Q So you had to exclude him as a possible contributor, because you couldn't get a male contributor, correct.

A Yes. That is correct.

(Emphasis added).

The State, in its rebuttal argument, addressed the fact that, although the anal swab tested positive for sperm, the DNA analysis of the swab revealed only D.F.'s DNA:

> [STATE]: Let's talk about not a contributor. You heard from Christina Tran. What did she tell you? She told you, she had to exclude the Defendant, because she could not get a male profile. She told you that females don't make sperm. There was too much of [D.F.]'s DNA on that profile or on that sample I should say, to determine whose DNA it was. That's what she was trying to tell you. It's not that because it wasn't him, she couldn't determine who it was.
>
> [DEFENSE]: Objection. That's not what she said.
>
> THE COURT: It's argument.
>
> [STATE]: She couldn't determine who it was. You have the report and I believe it's defense's evidence for the sperm fraction. It says [D.F.], We know that's impossible for her to produce sperm. It's because her skin cells, she had so much of it and so little of the sperm that they couldn't get a profile, doesn't mean it wasn't him. We know who the sperm belongs to because [D.F.] told you who it belonged to. We don't need Christina Tran to say it was him. We have [D.F.] And we know [D.F.] does not make sperm.

Lee argues that the trial court erred in allowing the State to characterize the DNA expert's testimony as implying that DNA evidence inculpated Lee in the offenses. The State responds that the court did not err because the prosecutor did not mischaracterize DNA evidence as stated by Ms. Tran.

Closing arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *Lee v. State*, 405 Md. 148, 161 (2008) (quoting *Herring*

v. New York, 422 U.S. 853, 862 (1975)). Attorneys are afforded "great leeway in presenting closing arguments to the jury." *Degren v. State,* 352 Md. 400, 429 (1999). However, the scope of comments made during closing arguments is not limitless. *Wilhelm v. State,* 272 Md. 404, 412 (1974). Although "[t]here are no hard-and-fast limitations within which the argument of earnest counsel must be confined[,]" *Degren,* 352 Md. at 429-30, "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Wilhelm,* 272 Md. at 415. "As such, we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion[.]" *Ingram v. State*, 427 Md. 717, 726 (2012) (quoting *Grandison v. State,* 341 Md. 175, 225 (1995)). "In deciding whether there was an abuse of discretion, we examine whether the jury was actually or likely misled or otherwise influenced to the prejudice of the accused by the State's comments." *Whack v. State*, 433 Md. 728, 742 (2013) (quoting *Wilhelm*, 272 Md. at 415-16).

Lee argues that the Court of Appeals's decision in *Whack v. State*, 433 Md. 728 (2013), mandates reversal in this case. In *Whack*, the State mischaracterized the strength of the DNA evidence against the defendant by, *inter alia*, stating in closing argument that the tests showed with near certainty that the defendant was a contributor to the DNA found at the scene of the crime, when, in fact, the DNA analyst had testified that the DNA profile obtained was consistent with the defendant's profile, but was also consistent

with the DNA profile for one out of every 172 African-American individuals.[6] *Id.* at 745-46. The Court held that reversal was required because of the gravity of the misstatement and the pivotal role that DNA evidence played in identifying the defendant as the perpetrator of the crime. *Id.* at 752-53.

The facts of this case, however, are distinguishable from those in *Whack*. Here, the prosecutor did not misstate the testimony of the DNA analyst and the limitations of the DNA results. Ms. Tran initially testified that she excluded Lee as a possible contributor to the DNA profile of the sperm fraction of the anal swab. However, Ms. Tran agreed with the prosecutor's statement that "you had to exclude [the defendant] as a possible contributor, because you couldn't get a *male* contributor [profile]." (Emphasis added). She explained that "[t]he sperm fraction of the anal/perianal swab yielded a DNA profile with alleles that are consistent with the known DNA profile of the victim [D.F.] of the 15 of the 15 tested loci," and that D.F.'s cells were "masking what little [male] DNA that could have been there." In other words, the testing showed that the sperm in the anal/perianal swab exhibited a DNA profile belonging to D.F.; however, because sperm necessarily have a male DNA profile, Ms. Tran explained that D.F.'s own DNA was likely masking the actual DNA profile of the sperm fraction.

[6] The prosecutor conflated two separate statistics: testimony that 1-in-212 trillion odds existed that an African-American other than the victim could have left a particular DNA profile in a DNA mixture, and testimony that 1-in-172 odds existed that any randomly selected African-American's DNA could be found in the mixture at issue—a discrepancy of *ten* orders of magnitude.

We disagree with Lee's argument that the prosecutor's statement—that "[t]here was too much of [D.F.]'s DNA on that profile or on that sample I should say, to determine whose DNA it was. It's not that because it wasn't [Lee], [Ms. Tran] couldn't determine who it was"—misled the jury. Instead, the prosecutor accurately summarized the DNA expert's testimony and argued a reasonable inference based on other testimony at the trial. We hold that the circuit court did not abuse its discretion in overruling Lee's objection at trial because the jury could not have been misled by the prosecutor's remarks.

II. Jury Instructions on Third-Degree Sex Offense

At trial, Lee moved for a judgment of acquittal for count 2 – second-degree rape. Lee did not move for acquittal on any of the other counts. Before the circuit court issued its jury instructions, the court reviewed the counts for each offense with the parties, and remarked that Lee was charged with five counts of second-degree sex offense and four counts of third-degree sex offense. The judge then instructed the jury that Lee was charged with committing both second-degree sex offenses and third-degree sex offenses, and described a second-degree sex offense as including only cunnilingus, analingus, and anal intercourse. In contrast, the judge instructed that a third-degree sex offense included penetration of the anal or genital opening by a part of the body other than the penis, mouth, or tongue. The verdict sheet, however, contained different descriptions of the charges:

> 5). Do you find the Defendant Guilty or Not Guilty as to the Second-degree Sex Offense (**Digital - Vagina**)?

6). Do you find the Defendant Guilty or Not Guilty as to the Second-degree Sex Offense (**Digital - Anal**)?

* * *

9). Do you find the Defendant Guilty or Not Guilty as to the Third-degree Sex Offense (**Cunnilingus**)?

10). Do you find the Defendant Guilty or Not Guilty as to the Third-degree Sex Offense (**Analingus**)?

(Emphasis added). Lee did not object to the number of counts nor did he object to the wording on the verdict sheet.

Lee now argues that, because a trial judge's instructions are binding on the jury, "[b]ased on the[] instruction[s given,] the jury had no legal basis to convict [him] of two counts of second-degree sex offense for digital anal and vaginal penetration and no authority to convict [him] of two counts of third-degree sex offense for oral anal and vaginal contact."[7] The State responds that the Lee has not preserved this argument because he failed to object to the instructions or verdict sheet at trial.

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Additionally, in order for a defendant to contest the legal sufficiency of the

[7] We note that the statutory language defining a second-degree sexual offense prohibits a sexual act "in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus." Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L.") §§ 3-301(e)(1)(v), 3-306(a). This criminalizes the acts described in counts five and six. Similarly, the statutory language defining a third-degree sexual offense prohibits sexual contact, described as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." C.L. §§ 3-301(f)(1), 3-307(a)(3). This language criminalizes the acts described in counts nine and ten.

evidence to convict him of a count against him, Maryland Rule 4-324(a) requires the defendant to move for judgment of acquittal at the close of the State's case or at the close of all the evidence and "state with particularity all reasons why the motion should be granted." Finally, a defendant may waive appellate review of alleged issues with jury instructions and the verdict sheet by failing to object at trail. *See Conyers v. State*, 354 Md. 132, 166-67, 171 (1999).

Lee cites to *Newman v. State*, for the proposition that the court's instructions as to the law "are binding on the jury and counsel as well." 65 Md. App. 85, 101 (1985). However, neither that case, nor any case we have found, has overturned a conviction based on an unobjected-to discrepancy between the court's jury instructions and the verdict sheet. On the contrary, the failure to move for judgment of acquittal on specific counts and the failure to object to the wording of the verdict sheet both preclude appellate review of Lee's argument. *See* Md. Rule 8-131(a); *Conyers*, 354 Md. at 166-67, 171; *cf. Yates v. State*, 202 Md. App. 700, 725-26 (2011) *aff'd,* 429 Md. 112 (2012).

Because Lee did not move for judgment of acquittal on these counts, did not object to the verdict sheet when it was given to the jury, and did not object to the verdicts when they were returned by the jury, we hold that Lee has failed to preserve this claim for our review.[8]

[8] Lee has not asked the Court to engage in plain error review.

III. Merger of Sentence for Sodomy and for Second-Degree Sex Offense

Lee next argues that the trial court erred in imposing separate sentences for his convictions for sodomy and second-degree sex offense.[9] The State agrees that merger is required in this case. We agree as well and vacate the sentence for count twelve, sodomy, and merge, for sentencing purposes, count twelve into the conviction for count three, second-degree sex offense.

As articulated by the Court of Appeals in *Sifrit v. State*,

> "Under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, the State can neither hold multiple trials nor punish a defendant multiple times for the same offense." *Holbrook v. State,* 364 Md. 354, 369, 772 A.2d 1240, 1248 (2001) (internal citations omitted). "Offenses merge and separate sentences are prohibited when, for instance, a defendant is convicted of two offenses based on the same act or acts and one offense is a lesser-included offense of the other." *Khalifa v. Maryland,* 382 Md. 400, 855 A.2d 1175 (2004). The normal test for determining if an offense merges into another is the "required evidence test." *State v. Jenkins,* 307 Md. 501, 518, 515 A.2d 465, 473 (1986). It is the "threshold" test and, if it is satisfied, merger follows as a matter of course. *Khalifa,* 382 Md. at 433, 855 A.2d at 1194.

383 Md. 116, 137 (2004) (Footnote omitted). The required evidence test, also known as the *Blockburger* test[10], looks to the elements of each offense, and, "if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Jenkins,* 307 Md. at 518.

[9] The court sentenced Lee to imprisonment of 20 years for second-degree sex offense, count three, and a concurrent 10 years imprisonment for sodomy, count twelve.

[10] *Blockburger v. United States*, 284 U.S. 299 (1932).

In this case, the convictions and sentences at issue are second-degree sex offense and sodomy. The elements of a second-degree sex offense relevant to this case are: "A person may not engage in a sexual act with another[,] . . . [i]f the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim." C.L. § 3-306. The statute defines a sexual act to include analingus, cunnilingus, fellatio, and anal intercourse, including penetration, however slight, of the anus. C.L. § 3-301(e). Sodomy is a common law offense, which prohibits "anal intercourse by a man with another person, fellatio, cunnilingus, and analingus." *DiBartolomeo v. State*, 61 Md. App. 302, 307 (1985).

Applying the required evidence test, we conclude that, for sentencing purposes, a sentence for sodomy merges with a sentence for a sex offense in the second-degree. Both offenses punish the acts of analingus, cunnilingus, fellatio, and anal penetration. C.L. §§ 3-301(e), 3-306; *DiBartolomeo*, 61 Md. App. at 307. Second-degree sex offense contains an additional element—the victim being under the age of 14. C.L. § 3-306(a)(3). Under the required evidence test, a sodomy conviction merges into the greater offense of second-degree sex offense. We therefore hold that Lee's conviction for sodomy, count twelve, should have been merged into his conviction for second-degree sex offense for sentencing purposes.

IV. Restriction on Cross-Examination

In his final argument, Lee contends that the circuit court abused its discretion by restricting cross-examination of the victim's mother about an alleged previous assault

that the victim suffered eight weeks prior to the incident in this case. Lee now argues that evidence of the prior sexual assault would show that the victim may have obtained the knowledge necessary to make accusations against him from the prior sexual assault. The State responds that the circuit court properly exercised its discretion to exclude the line of questioning and that the cross-examination did not fall under one of the exceptions in Maryland's rape shield law.

At trial during the cross-examination of the victim's mother, counsel for Lee broached the subject of the victim's therapy sessions. The State asked to approach the bench, and the following colloquy occurred:

> [STATE]: Are you going into the therapy for the other sexual assault?
>
> [DEFENSE]: No.
>
> [STATE]: The State would object to any questions about the sexual assault that happened on a bus, on a school bus.
>
> THE COURT: When?
>
> * * *
>
> [DEFENSE]: Eight months [ago]. [The victim's mother] said that the [victim] just recently ended counseling with therapy about the other sexual assault.[11] And she believes that because of the therapy, that's the reason that [the victim] is so forthcoming about the sexual assault. And I would like to get into the fact that she had therapy which discussed sexual issues. It didn't come out, so it's not something that just came out of

[11] Mother did not testify at trial about the victim's therapy for the prior sexual assault. We presume counsel was referring to pre-trial discussions she had with the mother.

nowhere. That it's possible because she had gone through therapy dealing with the sexual assault.

THE COURT: Are you going to have the therapist testify?

[DEFENSE]: No.

THE COURT: It's not a case of prior sexual promiscuity for example, in a rape case, it's not the issue. It's not – without a therapist to tell us to analyze that it's pure conjecture and she hasn't even testified yet. So it would be premature to effectively try to impeach her testimony. She hasn't testified at this juncture. I sustain the objection.

Neither party referred to the prior sexual assault or therapy again during trial.

"The scope of cross-examination lies within the sound discretion of the trial court." *Pantazes v. State*, 376 Md. 661, 681 (2003) (citing *Walker v. State*, 373 Md. 360, 394 (2003). Discretion is exercised by balancing "the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion." *Pantazes*, 376 Md. at 681 (quoting *State v. Cox*, 298 Md. 173, 178 (1983)); *see also Mines v. State*, 208 Md. App. 280, 295 (2012) ("Managing the scope of cross-examination is a matter that falls within the sound discretion of the trial court[,]" and its ruling will not be disturbed "absent a showing of prejudicial abuse of discretion.") (Citations and internal quotation marks omitted), *cert. denied*, 430 Md. 346 (2013).

Pursuant to Maryland Rule 5-412, the admissibility of evidence relating to the victim's sexual history is governed by Maryland's rape shield statute, codified at § 3-319

of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.). The statute provides in subsection (b):

> Evidence of a specific instance of a victim's prior sexual conduct may be admitted . . . **only if the judge finds that**:
>
> (1) the evidence is relevant;
>
> (2) the evidence is material to a fact in issue in the case;
>
> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
>
> (4) the evidence:
>
> (i) is of the victim's past sexual conduct with the defendant;
>
> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
>
> (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; **or**
>
> (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

(Emphasis added). Thus,

> [t]o be admissible, evidence of specific instances of a victim's past sexual conduct must fit within one of the enumerated exceptions *and* be found by the trial court to be relevant and material to a fact at issue in the case and to have probative value greater than its inflammatory or prejudicial nature.

Johnson v. State, 332 Md. 456, 463-64 (1993) (Emphasis added).

As the Court of Appeals explained in *White v. State*, 324 Md. 626, 634 (1991), the rape shield law was enacted "to prevent defense counsel from putting the victim 'on trial,' from unfairly invading the victim's privacy and from deflecting the jury's attention

from the true issue.'" "A trial court's ruling on the admissibility of specific instances of a victim's past sexual conduct is subject to review on an abuse of discretion standard." *Johnson*, 332 Md. at 464 (Citations omitted); *see Smith v. State*, 71 Md. App. 165, 182 (1987) ("In evaluating these three conditions, decisions on the relevance or inflammatory nature of the evidence rest in the sound discretion of the trial court and will not be reversed on appeal absent a showing that such discretion was clearly erroneous").

Lee cites to out-of-state cases for the proposition that:

> Many courts have held that, rape shield laws notwithstanding, a defendant in a child sex abuse case who has a good faith basis for believing that the alleged victim had been subject to other sexual abuse should be allowed to enquire about that prior incident to rebut an inference that only the defendant's actions could account for the child's abnormal knowledge of sexual activities.

However, the rape shield statutes at issue in the cases that Lee cites are materially different from Maryland's rape shield law. These statutes generally provide that "if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness is relevant to a material issue to the case and its probative value outweighs its inflammatory or prejudicial nature." *See, e.g.*, Colo. Rev. Stat. § 18-3-407; *People v. Osorio-Bahena*, 312 P.3d 247, 253 (Colo. App. 2013); Ark. Code § 16-42-101(b); *State v. Townsend*, 233 S.W.3d 680, 683 (Ark. 2006).

In addition to the balancing required by the out-of-state statutes, Maryland's rape shield law requires that the evidence fall into one of four exclusive categories, articulated

in C.L. § 3-319(b)(4).[12] In contrast to the cases cited by Lee, many other courts have come to the opposite conclusion, in part by relying the fact that their respective legislatures—like Maryland's—delineated specific exceptions to the prohibition evidence about the victim's prior sexual conduct. *See generally* Danny R. Veilleux, *Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts*, 83 A.L.R.4th 685 (Originally published in 1991). For example, in *People v. Arenda*, 330 N.W.2d 814 (Mich. 1982), the Michigan Supreme Court considered a rape shield statute similar to Maryland's, which only allowed "(a) Evidence of the victim's past sexual conduct with the actor[; or] (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." The court reasoned that the prohibitions contained in the rape shield law represented a legislative determination that, outside of the specific exceptions, *evidence of prior sexual experiences involving the juvenile prosecuting witness was irrelevant*. *Id.* at 817. The court also acknowledged that a blanket exception for this issue would swallow the rule

[12] The exceptions, found are that the evidence:

(i) is of the victim's past sexual conduct with the defendant;

(ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;

(iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or

(iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

prohibiting the admission of such evidence, because the victims who testified to the alleged conduct would expose themselves to such cross-examination in almost every case. *Id.* at 818.

Like the Michigan law at issue in *Arenda*, Maryland's rape shield law allows evidence of the victim's prior sexual experience to be introduced only if it falls under one of the four provisions codified at C.L. § 3-319(b)(4). The subject of the cross-examination in this case was D.F.'s past sexual activity with a person other than the defendant. As such, this activity does not fall within any of the exceptions to the rape shield law. *See Johnson*, 332 Md. at 463-64. We conclude that allowing an exception to the rape shield law's clear prohibition on evidence related to the victim's prior sexual conduct solely to show the victim's knowledge would wholly undermine the law's purpose. Therefore, we hold that the circuit court did not abuse its discretion in restricting cross-examination of the victim's mother about the victim's therapy or prior sexual assault.

SENTENCE FOR COUNT 12 VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID ¼ BY PRINCE GEORGE'S COUNTY AND ¾ BY APPELLANT.