Circuit Court for Talbot County
Case No.: 20-K-15-10966

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1174

September Term, 2016

MICHEAL TAYLOR

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: January 5, 2018

At the conclusion of a jury trial in the Circuit Court for Talbot County, Micheal Taylor, appellant, was convicted of sexual offense in the third degree and assault in the second degree. After sentencing, Taylor noted a timely appeal and presents us with the following four questions for our review:

1. Did the trial court err in not gra[n]ting a new trial following the improper argument of the State in closing argument and rebuttal closing argument?

2. Did the trial court err in admitting the testimony and DNA report of Dr. Leslie C. Mounkes based upon the State's failure to produce the physical evidence and establish a chain of custody?

3. Did the trial court err in admitting into evidence the DNA report and testimony related specifically to Exhibit 10 and 12 identified in the report based upon the failure of the Expert to testify that the findings related to that evidence was to a reasonable degree of scientific certainty?

4. Did the trial court err in admitting the hospital records containing laboratory reports with results of tests where the proponent of the statements was not available for cross examination, and where the results specifically stated they were not quantitative?

Because we perceive no reversible error, we will affirm.

Facts and Procedural History

There was evidence at trial of the following. On April 26, 2015, the victim went out drinking in St. Michaels, Maryland, following a dinner with her children and the children's father. Eventually, the victim arrived at Carpenter Street Saloon, where she met up with some acquaintances. Shortly thereafter, the victim met Taylor, with whom she had not had contact prior to that night. Taylor provided his name and phone number on a napkin. For a brief period, the victim left the bar to drop off her children's father

and pick up her mother from work. The victim's mother then drove her back the Carpenter Street Saloon, where the victim drank more alcoholic beverages and danced with some acquaintances she had met that night. At some point, the victim decided to go outside and smoke a cigarette. The victim testified that the next thing she remembers after that point is waking up naked in Taylor's house in the early hours of the morning of April 27, 2015. She testified that, after she awoke, Taylor made some crude comments, and she begged him to take her home. He drove her to her home.

The victim went to the hospital early that morning and reported that she "felt like [she had] had sex," but also said she was "missing chunks of time." A forensic nurse at the hospital "completed a SAFE examination of the victim, collected various items of physical evidence, and took a statement from the victim." Items collected during the SAFE exam included the victim's underwear, two maxi pads, and swabs taken from various areas of her body, including a spot on her upper chest where there was a bruise that the nurse described as "hickey-like in appearance."

The St. Michael's Police Department identified Taylor as the person who had taken the victim away from the Carpenter Street Saloon after she passed out, and the police executed a warrant to search his residence, as well as a warrant to obtain a sample of Taylor's DNA. Taylor gave a statement to police in which he admitted that he had been talking to the victim inside the Carpenter Street Saloon on the evening of April 26, and, at one point, had walked outside to smoke a cigarette when he saw the woman he had been talking to "passed out outside on the sidewalk." He determined that she was

unresponsive, and he put her in his vehicle and drove her to his house. Later, he took her to her home. The police obtained surveillance video footage from the Carpenter Street Saloon interior and parking area. The video of the parking area showed Taylor placing the victim in his vehicle outside the Carpenter Street Saloon. (The video was played for the jury.)

Taylor was later arrested and charged with kidnapping, rape in the second degree, sexual offense in the second degree, sexual offense in the third degree, and assault in the second degree. At trial, the State entered as nolle prosequi the kidnapping and second-degree sexual offense charges. Following the State's case, the trial court granted Taylor's motion for judgment of acquittal as to the second-degree rape charge because, the court explained, although there was evidence that the SAFE nurse had observed that the victim had sustained vaginal bruising, the victim herself did not remember what had happened that night and there was no expert testimony to establish that the source of the bruising was sexual intercourse. The court found that there was "also no evidence of semen, blood or saliva in the vagina that would indicate that there was sexual intercourse . . . that is to say, pen[ile] penetration of her vagina."

After Taylor declined to testify, the two surviving counts were submitted to the jury. The jury found Taylor guilty of second-degree assault and third-degree sexual offense. This appeal followed. Additional facts relevant to this appeal are included in the discussion below.

Discussion

I. The State's closing argument.

During the State's closing argument, the State made several remarks that Taylor contends were improper. First, the State commented on the inferences that could be drawn from DNA that was found on the victim's maxi pad:

> [BY THE STATE]: The DNA found on the maxi pad found mixed in with the fluids of [the victim], discharged onto a maxi pad. Other DNA on the hip of a pair of underpants. We don't know who that, well, we don't know when that underwear was last washed to simply state a fact there. We know there are no other men in that home. We don't know when it was washed, but we do know the licking swab [showing that Taylor's DNA was present on the victim's chest] happened at C Street. She did not shower. She went to the hospital. We do know that one of those maxi pads, I'm not sure if it's 10 or 12, was the one that she wore to the hospital between the time that she left Mr. Taylor's and the time that she got to the hospital wherein she did not void, shower, anything.

Taylor argues that these statements made by the State during closing argument were unsupported by the evidence in the record.

The State also made the following statements that Taylor contends were improper:

> [BY THE STATE]: Yeah, she's drunk and she's overly friendly in a bar. Does that mean that she consented to what happened to her before she woke up in that man's loft, naked? Is that really who we are as a society? A man can take a woman he tells you was collapsed on the sidewalk that you can see is completely not in control of her own sensibilities, scoop her into his car, put his hands all over her while she's completely unconscious, take her back to his residence, disrobe her and it's reasonable to believe that his DNA got on her maxi pad from her using the bathroom in his house? She's dancing, she's friendly, she's a sloppy drunk and he is a predator who took advantage of her. Please tell him so.

Taylor contends that these portions of the State's argument were improper because the statements "were inflammatory and were designed to appeal to the prejudices of the

jury." Moreover, Taylor asserts: "There was no evidence in the record that the Defendant disrobed the victim or that Defendant put his hands all over her." Taylor argues that the trial court erred in allowing the State to address these matters in its closing argument, and in failing "to cure the potential prejudice from the inflammatory remarks." Taylor concedes, however, that he lodged no objection during closing arguments at trial. But he urges us to consider his claim of improper arguments because, although he did "not object immediately . . . [he] did file a Motion for New Trial . . . . [where this argument] was addressed and argued."

Because no timely objection was made before the jury returned its verdict, the scope of our review on appeal is limited to whether the trial judge abused his discretion in refusing to grant a new trial on the basis of reasons that were raised for the first time after the trial concluded. The breadth of discretion for trial judges to grant or deny motions for new trial is so great that Maryland cases in the first half of the 20th century generally held that the trial court's "ruling [on a motion for new trial] is ordinarily not reviewable on appeal." *Brinard v. Denzik*, 226 Md. 287, 292 (1961). But the Court of Appeals observed in *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 54-57 (1992), that, in the latter part of the 20th century, "the correct statement of the law in this area" was that the trial judge's ruling was not totally unreviewable, but, nevertheless, was a discretionary ruling that "an appellate court does not generally disturb," as the Court had stated in *Mack v. State*, 300 Md. 583, 600 (1984):

> The question whether to grant a new trial is within the discretion of the trial court. Ordinarily, a trial court's order denying a motion for a new trial will

> be reviewed on appeal if it is claimed that the trial court abused its discretion. However, an appellate court does not generally disturb the exercise of a trial court's discretion in denying a motion for a new trial.

(Citations omitted.) *Accord Washington v. State*, 424 Md. 632, 667-68 (2012).

In the absence of a timely objection during the trial, we do not address *de novo* the merits of Taylor's contentions regarding the allegedly improper closing argument by the State, and we would reverse only if we concluded that, as a matter of law, the trial judge was required to grant a motion for new trial. Taylor has not persuaded us that the State's argument was so impermissible or egregious that the trial judge abused his discretion by denying the motion for a new trial. *Cf. Lawson v. State*, 389 Md. 570, 604 (2005) (wherein the "cumulative effect of the prosecutor's remarks was likely to have improperly influenced the jury"). It was not an abuse of discretion for the trial judge to deny a motion for new trial on the basis of untimely objections to the State's closing argument.

II. Chain of custody of DNA evidence.

During trial, the State called its DNA analysis expert, Dr. Leslie Mounkes. Mounkes authored the report that was introduced as State's Exhibit 6. Taylor objected to the admission of that report because Dr. Mounkes did not bring the rape kit to trial. The following exchange occurred:

> [BY TAYLOR'S COUNSEL]: [T]his is the State's DNA expert and it's my understanding that the kit that was sent to her she doesn't have with her[;] so I think that presents some practical issues.
>
> [BY THE STATE]: Because these attorneys and these jurors are going to do what with a fecal swab or a vaginal swab or soiled maxi pad?

> [BY TAYLOR'S COUNSEL]: Well, I sort of think it's an issue. I mean it creates a chain of custody issue.
>
> [BY THE STATE]: She can testify about the chain of custody.
>
> [BY THE COURT]: Well I think you know she can testify about the, is the . . . . [D]id you subpoena her duces tecum demand the kit?
>
> [BY TAYLOR'S COUNSEL]: No, we can.
>
> [BY THE COURT]: Okay. If you didn't subpoena her I don't think you can object to the lack of a kit. I mean there are chain of custody issues that a foundation must be laid at this point.
>
> [BY TAYLOR'S COUNSEL]: Well, your Honor, for the reasons that we expressed in our Motion in Limine as to the two items I renew those and in addition to the lack of the physical evidence that she examined I would also object.

The standard for "determining whether a proper chain of custody has been established . . . [is] whether there is a 'reasonable probability that no tampering occurred.'" *Cooper v. State*, 434 Md. 209, 227 (2013) (quoting *Breeding v. State*, 220 Md. 193, 199 (1959)). "[D]eterminations of the adequacy of the chain of custody are left to the sound discretion of the trial court, and we review those rulings for abuse of discretion." *Wheeler v. State*, 233 Md. App. 265, 274 (2017). As we said in *Easter v. State*, 223 Md. App. 65, 75, *cert. denied*, 445 Md. 488 (2015):

> Chain of custody evidence is necessary to demonstrate the "ultimate integrity of the physical evidence." *Best v. State,* 79 Md. App. 241, 256, 556 A.2d 701, *cert. denied,* 317 Md. 70, 562 A.2d 718 (1989). In most cases, an adequate chain of custody is established through the testimony of key witnesses who were responsible for the safekeeping of the evidence, i.e., those who can "'negate a possibility of "tampering" . . . and thus preclude a likelihood that the thing's condition was changed.'" *Jones v. State,* 172 Md. App. 444, 462, 915 A.2d 1010 (quoting *Wagner v. State,*

> 160 Md. App. 531, 552, 864 A.2d 1037 (2005)), *cert. denied,* 399 Md. 33, 922 A.2d 574 (2007). What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case. *Best,* 79 Md. App. at 250, 556 A.2d 701. **The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law.** *See Jones,* 172 Md. App. at 463, 915 A.2d 1010 (upholding the admission of the evidence, but noting that the gaps in the State's chain of custody supported defense counsel's remarks in closing that the jury should discount its value).

(Emphasis added.) *Accord Boston v. State*, ___ Md. App. ___, slip op. at 30, No. 871, September Term 2016 (filed December 20, 2017) (missing links in the chain of custody is not a circumstance that requires exclusion of the evidence, but, rather, is a factor that goes to the weight of the evidence).

In this case, we find no abuse of discretion in the trial court's admission of this evidence, despite the chain of custody objection appellant raises here. The SAFE nurse (Leslie Collier) testified that, after she collected the samples at issue while performing the sexual-assault examination, she "dried" the samples pursuant to standard procedure, labeled them, and then placed them in an envelope (which she sealed) that was included in the Maryland State Police rape kit. She then gave the sealed rape kit to Officer Jason Adams of the St. Michael's Police Department, who was the lead investigator on this case. Officer Adams testified that he received the sealed rape kit from Nurse Collier on the morning of April 27. It was in a sealed box, with which he did not tamper. He said he did not add to or remove anything from it. He then packaged the rape kit and sent it to the Maryland State Police laboratory for analysis.

Dr. Leslie Mounkes, who was accepted by the court as an expert in DNA analysis and forensic serology, testified about the chain of custody and her role in analyzing various items of physical evidence:

> [BY THE WITNESS]: Well, I start out by going down to the vault and I've been assigned a case then I pick up the evidence. The evidence comes with a chain of custody. I sign that. Take possession of the evidence. I take it back to the lab. We have a, a locked up in progress storage area there, that's where I keep the evidence and then I'll go through my serology if I need to do that, do we need tests to try and identify body fluids. I'll choose whatever samples I think are the best for DNA analysis. Go through my DNA analysis. I'll analyze my results. Write a report. My work is reviewed and then when I'm ready to complete the report and complete the case then I just seal all the evidence back up and take it back to the vault. So that's kind of the progression of the evidence all the way through the process.
>
> [BY THE STATE]: You say, seal it back up. That means it was once sealed previously?
>
> A. Yes, when I receive the evidence it's sealed and it comes, as I say, with the chain of custody that I pick up at the vault.
>
> Q. And who do you receive that from?
>
> A. I get it from the vault at the Maryland State Police Forensic Sciences Division.
>
> Q. And how does it get there to you?
>
> A. The law enforcement agency brings it in.

The State argues in its brief:

> The State's evidence established a "reasonable probability" that the item was collected by [Nurse] Collier and that it was not tampered with before Dr. Mounkes tested it. . . .
>
> * * *

> . . . Once that the court is satisfied, in its discretion, that there is a "reasonable probability" that the item in question was received in a materially unaltered form, any additional challenges go to the weight of the evidence, not the admissibility of the evidence . . . .

We agree. There were no unexplained gaps in the chain of custody, and there was no abuse of discretion in overruling the objection based on chain of custody.

III. State's Exhibit 6

Taylor's third argument, like the second, is related to evidence that was collected by the SAFE nurse and secured in the rape kit. As we noted above, State's Exhibit 6 was the DNA report authored by Dr. Mounkes, which was admitted over Taylor's objection. State's Exhibit 6 lists twelve items that Dr. Mounkes tested; in her report, she refers to these items as "exhibits." Taylor takes issue with the discussion of "exhibits" 10 and 12 in Dr. Mounkes's report, contending that the entirety of Exhibit 6 was inadmissible, and that any reference to the source of "exhibits" 10 and 12 was "clearly hearsay." We disagree.

The disputed "exhibits" were soiled maxi pads placed in the rape kit by the SAFE nurse when the victim came to the hospital the morning after her encounter with Taylor. "Exhibit" 10 was described in Dr. Mounkes's report as a "used maxi pad brought from home," and "Exhibit" 12 was described as a "used maxi pad worn to the hospital." Taylor makes two arguments in Section III of his brief. First, he asserts that the descriptive phrases "bought from home" and "worn to the hospital" were hearsay statements that should not have been admitted. As used in the report, however, those descriptive phrases were not offered to prove the truth of the matters asserted in the phrases, and

consequently, the statements were not hearsay. *See* Rule 5-801(c), defining "hearsay" in the Maryland Rules as a statement "offered in evidence to prove the truth of the matter asserted." In Dr. Mounkes's report, these statements were used merely to differentiate one tested item from another. No limiting instruction or redaction was requested regarding these phrases.

Taylor's second complaint about Dr. Mounkes's report is that the discussion of the test result for each of the maxi pads "do[es] not include the language that anything in that result is to a reasonable degree of scientific certainty." Taylor contends that, "in the situation where the results were not 'to a reasonable degree of scientific certainty' the Court should not have admitted the testimony or that portion of the report into evidence." The only case cited by Taylor in support of this argument is *Whack v. State*, 433 Md. 728 (2013). But the Court of Appeals said nothing in *Whack* about the prerequisites for admissibility of expert opinions regarding DNA; the sole issue in *Whack* concerned the prosecutor's misleading and improper references to the DNA evidence during closing argument. *Id*. at 746-47.

With respect to the maxi pads tested in this case, Dr. Mounkes was able to develop a DNA profile from one male contributor on each of these maxi pads, but neither of these items *unequivocally* showed the presence of Taylor's DNA, and Dr. Mounkes made no such representation. Dr. Mounkes testified only that Taylor could not be excluded as the contributor, and that the statistical chance of an African-American male being someone

whose Y.S.T.R. DNA profile was the same as that found on the maxi pads was 1 in 2,070.

Preliminarily, the State asserts that we need not reach the merits of Taylor's arguments on this point because, even if we were to agree with Taylor about the phrase "scientific certainty" being a condition precedent to the admission of any DNA evidence or testimony, the trial court's admission of this evidence was at most a harmless error. The State contends that the evidence relative to the male DNA on a maxi pad was not necessary for the conviction of third-degree sex offense, given the surveillance video that showed that Taylor groped the groggy victim right after he placed her in the front seat of his vehicle.[1] The State argues:

> Had Taylor been convicted of Second-Degree Rape, the State would be hard pressed to argue that the DNA evidence showing that he placed a "hickey" on E.A.'s collarbone and had sufficient intimate contact with her to leave his DNA on her maxi pad played no role in his conviction. But that charge was kept from the jury, and instead he was convicted of the

[1]During the prosecutor's closing argument, she urged the jury to pay special attention to the surveillance video depicting what happened after Taylor placed the victim in the front seat of his vehicle, stating:

> I would really urge you to watch carefully when you get back in the jury room because as you probably noticed the dome light inside the vehicle was still on for a bit of time after he got into the driver's seat. . . . [E]ven after the dome light goes off the vehicle sits there for quite some time. I think it's almost four minutes before he pulls out of the parking space. What I urge you to look very carefully at in the front seat of that vehicle with the dome light on, she does not move. He leans over and begins to touch around her crotch area. Takes his time there. She does not move a muscle. Then the light goes off, we don't know exactly what happened but we know he pulled out of that space with her in the vehicle and we know, because he told us, that he took her back to his residence.

> crimes for which there was actual videographic evidence. Beyond a reasonable doubt, the DNA testimony did not alter the outcome of this case, and Taylor's conviction should stand.

But, even if there was other evidence that would have been sufficient to support a conviction of third-degree sex offense, there is no way for us to know whether the jury's verdict on that count was based, in part, upon the evidence regarding the male DNA on the maxi pad, which could have supported a finding of sexual contact by way of "an intentional touching of the victim's or actor's genital, . . . or other intimate area for sexual arousal or gratification." Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 3-301(f)(1) (providing the statutory definition of "Sexual contact" that is prohibited by § 3-307(a)). Because we cannot rule out the possibility that the jury considered the maxi pad evidence in arriving at its verdict finding that Taylor had "sexual contact" with the victim, we do not agree with the State's contention that any error relative to the admission of this evidence was harmless beyond a reasonable doubt. *Cf. Brooks v. State,* 439 Md. 698, 739 (2014) ("when the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor").

The jury returned a simple verdict of "guilty" on the charge of "Sex Offense Third Degree," and did not specify (nor was it asked to specify) whether the verdict was based upon contact shown in the surveillance video, or based upon other findings the jury made regarding contact Taylor had with the victim's genital area, or both. It is true that the trial court did not mention the maxi pad evidence when the court denied the motion for judgment of acquittal as to the charge of third-degree sex offense. But there were no

instructions that would have precluded — or even discouraged — the jury from considering the DNA evidence regarding the maxi pads in connection with the third-degree sex offense count. Under the circumstances, we cannot declare a belief beyond a reasonable doubt that any error regarding the admission of this evidence was harmless or that it did not influence the jury's finding of guilt.

The State responds to the merits of Taylor's complaint about Dr. Mounkes's opinions regarding the maxi pads not using words "scientific certainty" by asserting: (1) the phrase "scientific certainty" is not a requirement for admission of an expert's opinion; and (2) the phrase "to a reasonable degree of scientific certainty" has been criticized by some authorities as having "no scientific meaning." According to the State, "[t]here is no case in Maryland stating that the in-court utterance of the phrase 'to a reasonable degree of scientific certainty' is a condition precedent to the admission of expert scientific evidence."

The State further asserts that the phrase "reasonable degree of scientific certainty" has come under fire from the National Commission on Forensic Sciences, and states in its brief:

> The phrase "to a reasonable degree of scientific certainty" is, in fact, now disfavored in the forensic community and most authorities now argue against its use. In 2016, the National Commission on Forensic Sciences has issued a lengthy and detailed statement on this topic, concluding that "[t]he phrase 'reasonable degree of scientific certainty,' which combines two words of concern — 'scientific' and 'certainty' — has no scientific meaning." National Commission on Forensic Sciences, "*Testimony Using The Term "'Reasonable Degree of Scientific Certainty*,'" at 4. https://www.justice.gov/ncfs/file/795336/download (last visited October 30, 2017). (Apx. 4) Citing a wide array of scholarly and judicial sources,

> the Commission recommended that the use of the phrase be discontinued as outdated and misleading. In the wake of that report, the Department of Justice issued a memorandum directing its lawyers, agents, and scientists to stop using that phrase in reports or trial testimony. https://www.justice.gov/opa/file/891366/download (last visited October 28, 2017). (Apx. 6). *See, e.g.*, Seth Augenstein, "*DOJ's Code of Conduct: No More 'Reasonable Scientific Certainty*,'" Forensic Magazine, Sept. 13, 2016.

Taylor does not cite any case that rebuts the State's arguments regarding "scientific certainty." (As noted above, Taylor cited only the inapposite case of *Whack v. State*, 433 Md. 728 (2013).) But neither party addressed the Court of Appeals's use of that phrase in *State v. Norton*, 443 Md. 517, 524 (2015), where the Court held that the inclusion in a "Forensic DNA Case Report" of a statement that the expert's conclusion was "'within a reasonable degree of scientific certainty' . . . rendered the Report testimonial within *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221, 183 L.Ed.2d 89 [(2012)]." After explaining that "[t]he forensic document, to be testimonial pursuant to the *Williams* plurality, must contain a conclusion that connects the defendant to the underlying crime," 443 Md. at 548, the *Norton* Court commented upon the language in that report that referred to "a reasonable degree of scientific certainty" of a "match" to a defendant's DNA:

> Under the paradigm so articulated, the Forensic DNA Case Report at issue in the instant case is testimonial. With respect to Justice Thomas's formality inquiry, the Report contains a certification in the phrase "within a reasonable degree of scientific certainty". The inclusion of such language, "within a reasonable degree of scientific certainty", in a DNA report identifying a match between a defendant's profile with that of a perpetrator is key to the acceptance of the expert's testimony into evidence in Maryland. *Young v. State*, 388 Md. 99, 120, 879 A.2d 44, 56 (2005). Without this language certifying the result, the testimony is without

> foundation. *Id*. The phrase, then, of "within a reasonable degree of scientific certainty", constitutes such "talismanic words" that, without them, the testimony cannot cross the threshold of acceptance by the judge as gatekeeper. *See Mayor & City Council of Baltimore v. Theiss,* 354 Md. 234, 261, 729 A.2d 965, 980 (1999) (Rodowsky, J., concurring).

Id. at 548-49 (footnote omitted).

Similarly, in *Young v. State*, 388 Md. 99 (2005), the Court of Appeals made numerous references to "scientific certainty," and noted that advances in DNA profiling, as of 2005, enabled a DNA expert "to testify, to a reasonable degree of scientific certainty, to the source of the DNA evidence," without presenting "contextual statistics." *Id*. at 105. The *Young* Court held:

> We conclude that there exist methods of DNA analysis employing certain markers that, when tested along a minimum number of loci, yield DNA profiles with an astonishingly small random match probability. When the random match probability is sufficiently minuscule, the DNA profile may be deemed unique. In such circumstances, testimony of a match is admissible without accompanying contextual statistics. In place of the statistics, the expert may inform the jury of the meaning of the match by identifying the person whose profile matched the profile of the DNA evidence as the source of that evidence; *i.e.,* **the expert *may testify* that in the absence of identical twins, it can be concluded to a reasonable scientific certainty that the evidence sample and the defendant sample came from the same person.**

Id. at 119-20 (emphasis added; footnotes omitted).

Although the multiple references to "scientific certainty" in the *Norton* and *Young* opinions indicate to us that the Court of Appeals has not, in the past, taken a position like the State urges, of treating the phrase as outdated and misleading, both *Norton* and *Young* were cases in which the expert's report *had* utilized the phrase to support a conclusion of a statistically unique match to the defendant's DNA, whereas, in the present case, Taylor

complains that one portion of the expert's report should have been excluded because the phrase was *not* utilized with respect to the findings regarding the maxi pads. In the *Theiss* concurring opinion of Judge Rodowsky, cited by the *Norton* Court in the passage quoted above, Judge Rodowsky explained: "An expert opinion that is not rendered with reasonable certainty or reasonable probability is not necessarily inadmissible. For example, the opinion may be admissible when, in conjunction with additional evidence, the combination amounts to sufficient probable proof of causation." 354 Md. 234, 261 (1999).

Here, the appropriate omission of the phrase "scientific certainty" by Dr. Mounkes was in that portion of the expert's report that did not purport to identify the DNA on certain items as conclusively being that of Taylor, even though his DNA was *consistent with* that found on the tested evidence, which, in turn, was consistent with the DNA of only 1 in 2070 African American males in the general population. We are satisfied that, when considered in context, the opinion of the expert was sufficiently explained by the expert's testimony and was properly admitted under Rule 5-702.

The DNA evidence was presented through live testimony of Dr. Mounkes, who works for the Maryland State Police Forensic Sciences Division. She testified that she has a bachelor degree in microbiology, a master degree in forensic molecular biology, and a Ph.D. in molecular and cellular biology. She was accepted by the court, without objection, as an expert in "the field of forensic serology and DNA analysis." She

testified that she was the author of the DNA report admitted in evidence as State's Exhibit 6.

Dr. Mounkes explained that her routine practice is to analyze the various items in a rape kit differently depending upon an initial screening test that provides her a quantitative measure of the relative percentage of female DNA versus male DNA detected on each item. In this case, for the items of physical evidence on which more than 5% of the DNA was from a male contributor, she performed the more definitive "S.T.R. analysis" that is capable of identifying the contributors with a very high degree of certainty. *See Maryland v. King*, 569 U.S. 435, 443 (2013) ("STR analysis makes it possible to determine whether a biological tissue matches a suspect with near certainty." (internal quotation marks omitted)); *Whack, supra*, 433 Md. at 744-45.

For example, the sample that was taken by swabbing the victim's upper chest contained DNA from two contributors, one being the victim, and the other being a male. The male DNA was more than 5% of the total DNA present on that item. Using S.T.R. analysis, Dr. Mounkes was able to conclude that that sample did "match, to a reasonable degree of scientific certainty [the known DNA sample taken from] Micheal Taylor," and therefore, he "was found to be the source of" the non-victim DNA in the swab taken from the victim's chest area.

For the items of evidence on which less than 5% of the DNA was from a male contributor, Dr. Mounkes used "Y.S.T.R. testing," which can establish only the probability, if any, rather than a near certainty, of a connection to the person providing a

known DNA sample; that is, the Y.S.T.R. test can tell whether a person can be excluded as a possible contributor of DNA found on an item of evidence. Y.S.T.R. testing was performed on the samples taken from the victim's two maxi pads in the rape kit. After conducting the Y.S.T.R. analysis of those samples, Dr. Mounkes was not able to state that Taylor was in fact the source of the male DNA, but *could* say that the "Y.S.T.R. profile" of the male contributor is the same as the "Y.S.T.R. profile" of Micheal Taylor. Dr. Mounkes testified that that meant that he "cannot be excluded as the contributor of that" sample. In further explaining how many other people cannot be excluded as possible contributors of that sample, Dr. Mounkes testified that the overall "probability of finding this particular . . . Y.S.T.R. profile in the [overall] population is 1 in 8,621." "[H]e cannot be excluded because an [sic] array of 1 in 8,621 it is possible that somebody else might have that Y.S.T.R. profile as well." Further, she explained:

> It would be most likely somebody who is related to him because the Y chromosome, which I didn't say earlier, is inherited parternally [sic]. So it is handed down from father to son, father to son, father to son. So anybody in his father's line who is male, would be expected to have the same Y chromosome because it was passed down through that paternal lineage.

On cross-examination, defense counsel clarified that Dr. Mounkes had also concluded that, within the African American population, of which Taylor was a member, the probability of finding another African American male with the same Y.S.T.R. profile as the one found on the maxi pad was higher, specifically: 1 in 2,070.

We are satisfied that the trial court did not err in admitting Dr. Mounkes's testimony and report. She adequately explained the limited nature of the findings made

with respect to the DNA found on the maxi pads, and the trial court did not abuse its discretion in concluding that the evidence was admissible under Rule 5-702.

IV. Admission of the toxicology report.

Prior to trial, Taylor made the following argument in support of a motion *in limine* to preclude the State from introducing the toxicology report prepared in connection with the victim's visit to the hospital on April 27:

> [BY TAYLOR'S COUNSEL]: . . . We are objecting to the toxicology report in its entirety because it is not signed by anyone. It says it was prepared in Minnesota. And it does draw conclusions. It lists a blood alcohol content and it lists her positive for certain substances and if you flip through the rest of the report in the footnotes it says that these results are not quantitative. That they . . . cannot be used to determine the level of intoxication . . . .
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> [BY THE COURT]: Isn't the evidence that will be adduced that she [was] in Carpenter Street [Saloon] drinking, became disoriented and may have fallen down either at Carpenter Street or out front of Carpenter Street[?]
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> [BY TAYLOR'S COUNSEL]: Yes, but I think all of that can be adduced testimonially. I think the prejudicial part is to put in a lab result that lists a blood alcohol in the urine but the text itself says, this is not a quantitative result and cannot be used to determine the level of intoxication. . . . The difficulty is when you put a number to it and we don't have any science to back it up and Mr. Taylor doesn't have the opportunity to cross examine the person who's saying, this was her blood alcohol content . . . . And there's no signature on that lab report.

In denying Taylor's motion, the Court explained:

> [BY THE COURT]: . . . In this case it seems conceded by all . . . that the victim was intoxicated at the time. This does not create some fact that is not, it's almost conceded that she was intoxicated at the time, and again, I haven't heard the evidence. If by the time this report were to come in the

> victim is denying that she was intoxicated that would be a different issue at that time.

At the conclusion of Nurse Leslie Collier's testimony, the entire medical record from the April 27 hospital visit, including the toxicology report, was admitted as State's Exhibit 1, over objection by Taylor. The report includes a finding of "212" for the victim's blood "ALC," with a footnote that states: "COLLECTED FOR MEDICAL PURPOSES ONLY!!" The positive result for "BENZO UR" (benzodiazepines, such as Valium) does not contain any such footnote. Certain other results, such as those indicating a lack of THC in victim's blood, note that these particular results are "[u]nconfirmed [and] semi-quantitative. . . . Results can be confirmed by reference lab . . . if requested within 7 days."

On appeal, Taylor argues that the trial court erred in admitting the alcohol and Benzo results in the toxicology report over Taylor's objections. Taylor asserts that the State's theory of culpability on the Sexual Offense in the Third Degree charge was "that of a mentally incapacitated individual . . . . As such, the level of intoxication of the victim, and the presence of any other drugs in the victim's system is evidence that bears directly on the essential elements of the crime."

The State asserts in its brief that Taylor's arguments are without merit, and that the hospital records, including the results of the blood tests, were properly admitted. It states:

> The State introduced the hospital records for [the victim's April 27 visit] at trial. (T1. 196) The records were accompanied by a certificate from the custodian of records in full compliance with Maryland Rule 5-902

> (2017). (T1.19; State's Ex. 1). Taylor did not complain at trial, and does not allege now, that the certificate was invalid. Nor does he complain that the State failed to comply with the notice requirements of the rule. In short, there is no question but that the records were properly authenticated under Rule 5-902.
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> The records were made and kept in the ordinary course of business, and were not prepared for litigation purposes. Taylor did not complain at trial, and does not complain now, that the documents are anything other than ordinary records made and kept in the course of Shore Medical Center's business as a hospital. Thus, not only were the documents properly authenticated, but they were admissible as an exception to the rule against hearsay. Md. Rule 5-803[(b)(6)] (2017).

But the State also argues that the admission of the toxicology report was of no importance to the outcome of this case because it was undisputed that the victim was intoxicated and had voluntarily taken a Valium. The State therefore urges us to rule that any possible error in admitting the toxicology report was harmless, stating in its brief:

> Taylor asserts that the challenged report was "offered for the purpose of proving some fact, namely, the intoxication of the victim." (Appellant's Brief at 27). There is no support in the record for this assertion. More to the point, the victim's intoxication was uncontested and proven from a variety of other sources, including the victim's own testimony. Accordingly, any error was harmless.

We agree with the State's assertion that the jury did not base its conclusion that the victim was mentally incapacitated on the toxicology report — a report, we note, that no witness explained to the jury, that neither party asked any questions about, and that neither party mentioned in closing arguments. Indeed, the uncontroverted evidence of the victim's intoxication included the victim's own testimony; her mother's testimony; and Taylor's written statement to police, admitted as State's Exhibit 2, in which Taylor

admitted he encountered the victim outside the bar "passed out on the sidewalk." During closing arguments, Taylor's counsel told the jury:

> [BY TAYLOR'S COUNSEL]: [The victim] told us that she has no recollection from a certain point and you can see the video. You saw, you heard her recount the alcohol she consumed that evening. It starts at Applebee's with a mixture of Fireball, which is a liquor, mixed with hard cider, a couple there. Some more Fireball at Carpenter Street [Saloon] with a beer. Later on some more Fireball, and I think another beer and then some other alcohol that someone else bought her. So she gives us, gives us this explanation that she wakes up completely naked in Mr. Taylor's house. . . . She goes on to say, I feel like I had sex. Well when I asked her she said, honestly I can't say I did, I didn't or I feel like I did.
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> So I would submit to you, ladies and gentlemen, that **when you look at the case in its overall entirety, you have to answer a couple of questions. Was [the victim] drunk? Had [the victim] ha[d] too much to drink? I don't think there's any doubt or any dispute about that. She says she has no recollection, that she passed out, that she was, that she just had had too much to drink. I think we all can take her at her word for that.**

(Emphasis added.)

In light of the uncontroverted evidence of the victim's excessive alcohol consumption, and defense counsel's concession that she passed out because she had too much to drink, we are satisfied, beyond a reasonable doubt, that the toxicology report had no influence on the verdict, and, even if there had been any error in its admission, it was harmless error. *Cf. Fields v. State*, 395 Md. 758, 759 (2006) ("Because we shall hold that even if the court erred with respect to the evidentiary issue, the error was harmless beyond a reasonable doubt, we do not reach the [merits of the hearsay] issue.").

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