Circuit Court for Baltimore City
Case No. 118108008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2274

September Term, 2019

KEITH HAYES

v.

STATE OF MARYLAND

Beachley,
Shaw,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: March 22, 2022

Following a bench trial in the Circuit Court for Baltimore City, the court found appellant, Keith Hayes, guilty of sexual offense in the first degree, conspiracy, assault in the second degree, and false imprisonment. The court sentenced appellant to a term of life imprisonment, with all but 35 years suspended, for the sexual offense, as well as additional consecutive terms totaling 40 years for the other offenses. Appellant appealed and presented the following three issues:

> 1. Whether the court erred or abused its discretion in both denying his motion for postponement and declining his request to present that motion to the administrative judge;
>
> 2. Whether appellant's right to confrontation was denied when the court admitted testimony summarizing the formal reports and conclusions of a temporarily unavailable DNA analyst, through the report's technical reviewers; and
>
> 3. Whether the court erred in admitting prior convictions of appellant and his co-defendant for similar sexual offenses, as proof of lack of consent in this case, where the court failed to ascertain that those convictions were not final.

Finding neither reversible error nor abuse of discretion, we affirm.

BACKGROUND

On a June morning in 2017, T.P., a woman having "no fixed address," was waiting at a bus stop on North Avenue in Baltimore City when she was approached by two men, later identified as appellant and co-defendant, Travis Burroughs. The men asked whether

she wanted "to make some money," and T.P. "said yes."[1] She and the two men entered a vehicle and traveled to the Park Heights neighborhood of Baltimore City.

They exited the vehicle and walked toward an abandoned house, T.P. walking in front of the two men. At that time, Burroughs produced a knife, which he held against T.P.'s neck, and he ordered her to enter the house and proceed to the basement, where there was a bed. Once inside, the two men either ordered T.P. to disrobe or they forcibly removed her clothes. Then, each man, in turn, performed non-consensual sexual acts on T.P. Although her various statements to police officers and medical providers conflicted with her trial testimony, it is reasonably clear that she was forced to fellate each man, and she stated that either or both of them also penetrated her either vaginally or anally. Burroughs left the abandoned house first. Shortly thereafter, appellant heard a noise and went upstairs, and T.P. was able to retrieve her clothes and flee. She flagged down a stranger and placed a 911 call.

Police officers responded and transported her to Mercy Medical Center, where a SAFE exam was performed.[2] A detective from the Sex Offense Unit interviewed her at Mercy Hospital upon the conclusion of the exam. Police evidence technicians examined

[1] On cross-examination, T.P. acknowledged that she understood the men's request as a solicitation to perform sexual acts in exchange for money. The victim further acknowledged that, initially, she left with appellant and Burroughs voluntarily.

[2] "SAFE" stands for "Sexual Assault Forensic Examination." *State v. Miller*, 475 Md. 263, 265 (2021).

the abandoned house, took photographs, and recovered, on a bed in the basement, a yellow knife. Within several weeks, however, the case went cold.

In December 2017, detectives learned that appellant and Burroughs had been charged with other similar crimes in one or more unrelated cases. A detective from the Sex Offense Cold Case Unit contacted T.P. and interviewed her, at which time she identified appellant and Burroughs, from photographic arrays, as her assailants. The detective ordered that a comparison be performed between the DNA profiles that had been developed from T.P.'s SAFE exam with those associated with appellant and Burroughs, which had already been developed and were stored in law enforcement databases.[3] A match was found between items from T.P.'s SAFE kit and the DNA standards developed for appellant and Burroughs.

A 21-count indictment was returned, by the Grand Jury for Baltimore City, charging appellant with various sexual offenses, conspiracy, and robbery of the victim, T.P.[4] A similar indictment was returned charging appellant's co-defendant, Burroughs. The

[3] DNA stands for "deoxyribonucleic acid," the so-called genetic blueprint for a living organism. *Miller*, 475 Md. at 265.

[4] The charges against appellant were: first-degree sexual offense (fellatio), first-degree sexual offense (anal intercourse), conspiracy to commit first-degree sexual offense (fellatio), conspiracy to commit first-degree sexual offense (anal intercourse), four counts of second-degree sexual offense, robbery, conspiracy to commit robbery, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, sodomy, unnatural and perverted sexual practice, theft of items having a value less than $1,000, conspiracy to commit theft of items having a value less than $1,000, first-degree assault, conspiracy to commit first-degree assault, second-degree assault, false imprisonment, and wearing and carrying a dangerous weapon openly with the intent to injure.

defendants were tried jointly in the Circuit Court for Baltimore City. Shortly before the start of *voir dire*, appellant waived a jury trial and elected to be tried by the court, while Burroughs was tried by the jury that then was selected.

After the jury reached a verdict in Burroughs's case,[5] the court reconvened for argument and to render its verdict in appellant's case. The court found appellant guilty of one count of first-degree sexual offense (fellatio), one count of conspiracy to commit fellatio, second-degree assault, and false imprisonment. The court acquitted appellant of the remaining charges or, in two instances (convictions of one count of second-degree sexual offense and unnatural and perverted sexual practice), merged them into first-degree sexual offense (fellatio) for sentencing purposes. After the court imposed sentences totaling 75 years of active incarceration,[6] this appeal followed. Additional facts will be set forth where pertinent to discussion of the issues.

[5] The jury acquitted Burroughs of first-degree sexual offense (fellatio), second-degree sexual offense (fellatio), robbery, conspiracy to commit robbery, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, first-degree assault, second-degree assault, and wearing and carrying a dangerous weapon openly with the intent to injure. The jury was unable to reach a verdict on the remaining counts. In November 2019, Burroughs was retried on those counts and found guilty of fourth-degree sexual offense, sodomy, and false imprisonment, and was sentenced to life imprisonment, with all but 60 years suspended, for false imprisonment, and concurrent terms of one year for fourth-degree sexual offense and ten years for sodomy. *Burroughs v. State*, No. 2413, Sept. Term, 2019, at 1 (filed Nov. 19, 2021). On appeal, we vacated the conviction for fourth-degree sexual offense, ordered that the sentence for false imprisonment be corrected to reflect a flat 60-year sentence, consistent with the transcript, but otherwise affirmed the judgments. *Id.* at 25.

[6] The court sentenced appellant as follows: on Count I, first-degree sexual offense (fellatio), life imprisonment, with all but 35 years suspended; on Count III, conspiracy to commit fellatio, 35 years' imprisonment, consecutive to Count I; on Count XIX, (continued)

DISCUSSION

I.

Parties' Contentions

Appellant contends that the trial judge erred and abused her discretion in denying his motion to postpone and in declining to refer that motion to the administrative judge. He asserts that because, under Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 6-103, and Maryland Rule 4-271, only the administrative judge or that judge's designee has the power to grant a postponement "for good cause shown," the trial judge "was without authority to determine, in her own discretion, whether or not there was 'good cause shown' for a postponement." He further contends that the ground he asserted for postponement, the need to obtain medical records that would show he was hospitalized at the time of the crimes, implicated the "vital issue" of his criminal agency and the trial judge's actions in denying his motion for postponement and refusing to refer it to the administrative judge amounted to a denial of due process. In sum, appellant contends that the trial judge erred in determining that she had the power to act, and that she abused her discretion in denying the postponement.

The State counters that, because appellant "did not argue to the trial court that the court did not have authority to deny his postponement request, that claim is waived."

---

second-degree assault, time served; and on Count XX, false imprisonment, 5 years' imprisonment, consecutive to Counts I and III. In addition, the court ordered 5 years' supervised probation, and it ordered that all sentences in this case were to run consecutively to all other outstanding Maryland sentences.

Regarding the merits of the claim, the State directs us to *Howard v. State*, 440 Md. 427 (2014), where the Court of Appeals held that "any circuit court judge may deny a motion to postpone." *Id.* at 440. Thus, according to the State, the trial judge acted within her authority, and she did not abuse her discretion. According to the State, the record reflects that the judge "carefully considered" appellant's motion for postponement but that, given the circumstances (principally, that there had been several previous postponements, that the motion at issue was made the day before trial, and that appellant had approximately one year to seek the medical records he claimed were exculpatory but took no action until just before trial), the judge properly exercised her discretion in denying appellant's motion and refusing to refer it to the administrative judge.

Factual Context

The day before trial, at a motions hearing, the defense requested a postponement. The following occurred:

> [DEFENSE COUNSEL]: Your Honor, so last week I had an opportunity to speak to Mr. Hayes who had an opportunity to speak to his mother who informed me that she may have information relevant to these proceedings, but she did not have that information in her possession, and she had a funeral this week so I haven't heard from her since Sunday. So I don't have that information for him that he wants to use it for a defense. So Mr. Hayes is requesting a postponement.
>
> THE COURT: **So I lack the authority to grant a postponement.** So can you give me a general idea of what kind of information this might be?
>
> [DEFENSE COUNSEL]: So I'm informed that this offense is alleged to have occurred on June 10th of 2017. I'm under the impression that he has medical records which shows that at that time he was in the hospital.

THE COURT: May I have the court file, please? Okay. So he has medical records that he may have been in the hospital on June 10th, 2017; is that correct?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: Okay. And you don't have them today?

[DEFENSE COUNSEL]: I don't have them today and I'm not sure when his mother is going to be able to put her hands on it or if she's going to be able to put her hands on more. I don't know the answer to that question.

THE COURT: **And this is information that just came to you** --

[DEFENSE COUNSEL]: On --

THE COURT: -- **over the past week?**

[DEFENSE COUNSEL]: -- Thursday of last week.

THE COURT: Okay. And this is Tuesday. So within three business days --

[DEFENSE COUNSEL]: Yes.

THE COURT: -- **you just came into possession of this information?** So I have to, as I indicated, **I lack the authority to grant a postponement, but I have to be convinced that there's even a reason to send you to Postponement Court. I don't have to send you.** Does the State want to be heard?

[PROSECUTOR]: The State would object to a postponement in this case. Been several postponements up until now. The indictment in this case was finalized on April the 19th of 2018. If either of the defendants had an alibi, they had plenty of time to develop that alibi and develop any proof regarding that alibi in the intervening time.

* * *

THE COURT: Okay. Well, I'm going to decline to send you to Postponement Court. **It looks as if the Defendant was on notice of this matter as early as May of 2018. It looks like that's when you entered your appearance, sir, and this is now July 30th, 2019.**

> So it seems to me that -- well, **let's be generous. Let's say, July of 2018, the Defendant would have been on notice of the nature of the allegation and the date in which the allegation is alleged to have taken place as that's in the indictment. The June 10th, 2017 date is in the indictment.**
>
> **So a full year to alert you, sir, of a possible defense where you would have had the ability to independently obtain those records or to assist the Defendant in obtaining those records himself.** And I don't see -- it looks like you all were before Judge Cox for a moment on May 13th, 2019, and that case was returned to Reception Court. And on that date, May 13th, which would have been more than 60 days ago, the matter was set on my docket for today for trial. Even knowing about it then would have given you enough time to get those records.
>
> So I am not going to send you to Reception Court (sic) to even be heard on a postponement, sir. **So while I have the authority to deny one, I don't have the authority to grant one and I am denying your postponement request. And to the extent that you've made a request to go to Postponement Court to be heard, I am denying that request as well.**

(Emphasis added).

Analysis

Preservation

Initially, we reject the State's non-preservation argument. Maryland Rule 8-131(a) provides that "[o]rdinarily, 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[.]" Here, the trial judge plainly ruled on the matter now raised on appeal, declaring, "I lack the authority to grant a postponement, but I have to be convinced that there's even a reason to send you to Postponement Court. I don't have to send you." Later, the judge reiterated, "So while I have the authority to deny one, I don't have the authority to grant one and I am denying your postponement request. And to the extent that you've made a request to go to

Postponement Court to be heard, I am denying that request as well." Under Rule 8-131(a), that is all that is required to preserve the issue for appeal. We therefore turn to the merits of appellant's claim.

Merits of the Claim

Section 6-103 of the Criminal Procedure Article provides:

> (a)(1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
>
> (i) the appearance of counsel; or
>
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
>
> (2) The trial date may not be later than 180 days after the earlier of those events.
>
> (b)(1) For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court:
>
> (i) on motion of a party; or
>
> (ii) on the initiative of the circuit court.
>
> (2) If a circuit court trial date is changed under paragraph (1) of this subsection, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown.
>
> (c) The Court of Appeals may adopt additional rules to carry out this section.

The implementing rule contemplated by CP § 6-103(c) is Maryland Rule 4-271, which provides:

> **(a) Trial Date in Circuit Court.**
>
> (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant

> before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. When a case has been transferred from the District Court because of a demand for jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-214 (a), the date of the appearance of counsel for purposes of this Rule is the date the case was docketed in the circuit court. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.
>
> (2) Upon a finding by the Chief Judge of the Court of Appeals that the number of demands for jury trial filed in the District Court for a county is having a critical impact on the efficient operation of the circuit court for that county, the Chief Judge, by Administrative Order, may exempt from this section cases transferred to that circuit court from the District Court because of a demand for jury trial.
>
> **(b) Change of Trial Date in District Court.** The date for trial in the District Court may be changed on motion of a party, or on the court's initiative, and for good cause shown.

In *Howard*, 440 Md. 427, the petitioner argued that under CP § 6-103 and Rule 4-271, only a county administrative judge or her designee has the power to deny a motion to postpone. *Id.* at 434. The Court of Appeals flatly rejected this interpretation of the statute and enabling rule, holding that "any circuit court judge may deny a motion to postpone." *Id.* at 431; *id.* at 440.[7] The Court reasoned that, otherwise, the "primary purpose" of the statute and the rule—"'to further society's interest in the prompt disposition of criminal trials'"—would be frustrated because a trial judge would be rendered powerless

[7] It is true, nonetheless, that only a county administrative judge or her designee has the power to *grant* a motion to postpone. That conclusion is in accord with the express language of CP § 6-103(b)(1)-(2) and Rule 4-271(a)(1).

to deny even the most "belated and frivolous" motions for postponement. *Id.* at 439 (quoting *State v. Frazier*, 298 Md. 422, 456 (1984)). The Court expressly disavowed "isolated quotations from cases in which [it] stated in *dicta* that only a county administrative judge or that judge's designee may deny a motion to postpone," reasoning that those decisions addressed the grant, not the denial, of motions to postpone. *Id.* at 440 (citing *Frazier*, 298 Md. at 450; *Calhoun v. State*, 299 Md. 1, 7 (1984); *State v. Brown*, 355 Md. 89, 98 (1999)). The Court concluded, "neither the plain language nor the purpose of CP § 6-103 and Maryland Rule 4-271 confers on a defendant the right to have a motion to postpone considered only by an administrative judge or that judge's designee." *Id.*

While "the authority to deny [a] motion to postpone" is vested in "any circuit court judge," such a ruling is reviewable on appeal for abuse of discretion. *Id.* at 440-41. "A trial court abuses its discretion when "no reasonable person would take the view adopted by" the trial court, "or when the court acts without reference to any guiding rules or principles." *Kusi v. State*, 438 Md. 362, 386 (2014).

Howard controls the present case. Appellant attempts to avoid its preclusive effect by rephrasing the same argument rejected in that case by our highest Court.[8] We perceive no meaningful distinction between saying that a trial judge (who is neither the

[8] Appellant's Brief cites *State v. Hicks*, 285 Md. 310, *on motion for reconsideration*, 285 Md. 334 (1979), *Goins v. State*, 293 Md. 97 (1982), and *Frazier*, 298 Md. 422, in support of his argument, but fails even to mention, let alone distinguish this case from, *Howard*. (Nor does he address *Howard* in his Reply Brief.) We are at a loss to understand why he would do so, but, in any event, that glaring omission results in a misleading picture of the current state of the law on this subject.

administrative judge nor that judge's designee) lacks the power to deny a motion to postpone, as the petitioner unsuccessfully argued in *Howard*, and saying that a trial judge lacks the power to find that there was no good cause shown for a postponement, as appellant argues here. A finding that no good cause was shown inevitably would lead to the denial of a motion to postpone. We hold that the trial judge did not err in concluding that she had the power to deny both the motion for postponement and appellant's request to present that motion to the administrative judge.

We turn next to address whether the trial judge abused her discretion in denying appellant's motions. Among the circumstances faced by the trial judge were: (1) appellant moved for postponement at a pretrial motions hearing, one day before the scheduled trial date; (2) the case had been postponed several times previously; and (3) as the judge aptly observed, the reason for the postponement request, to enable appellant to obtain medical records that purportedly would show that he was hospitalized on the day of the crimes, was within the constructive knowledge of both appellant and defense counsel no later than the date of the State's initial disclosures under Maryland Rule 4-263, more than one year prior to appellant's postponement request.[9] Under these circumstances, we do not fault the trial judge for denying appellant's eleventh-hour motions. We cannot say that "no reasonable person would [have taken] the view adopted by" the trial judge, or that she acted "without

[9] Even this date was a "generous" assumption, as the judge pointed out. The indictment, filed nearly three months previously, expressly alleged the date of the crimes.

reference to any guiding rules or principles." *Kusi*, 438 Md. at 386. Accordingly, we find no abuse of discretion.

II.

Parties' Contentions

Appellant contends that his right to confrontation was infringed because the circuit court admitted testimony summarizing the formal reports and conclusions of a temporarily unavailable DNA analyst, through the technical reviewers of the two reports. After appellant filed his opening brief, the Court of Appeals rendered a decision in *State v. Miller*, 475 Md. 263 (2021), holding that a technical reviewer of a forensic report was an adequate witness for confrontation purposes. Seeking to distinguish this case from *Miller*, appellant contends in his Reply Brief that "*Miller* stands for the proposition that a technical reviewer is a permissible substitute for the analyst and author of the report only when the State establishes that the witness played such a role in the generation of the evidence that it is fair to describe them as 'the functional equivalent of a second author.'" *Miller*, 475 Md. at 291. Here, according to appellant, the State "failed to lay the required foundation" required by *Miller*, resulting in a constitutional violation in this case.

The State counters that *Miller* is dispositive here. According to the State, there was no constitutional violation because one of the technical reviewers merely provided "basis testimony" to support the conclusions of the other technical reviewer, who, in turn, "testified to her own conclusions based on her independent analysis of the data."

Factual Context

There are two DNA reports at issue in this case: the first was prepared in 2017, when DNA testing was performed on T.P.'s SAFE kit; and the second was prepared in 2018, after the Cold Case Unit detective ordered that T.P.'s SAFE kit be compared with standards developed from appellant and Burroughs. The analyst who had been the primary author of both reports, Suzanne Gray, was scheduled to testify. However, she was expecting, and, on the morning of the scheduled trial date, she gave birth to a child and was, therefore, unavailable to testify. At a motions hearing held that morning, the State moved to add the technical reviewers of the DNA reports, Christine Hurley and Virginia Sladko, to the witness list so that they could testify in place of Ms. Gray. Over objections from both defendants, the court granted that motion.

After the State called all its other witnesses, Ms. Hurley was called to testify about the 2017 DNA report, and Ms. Sladko was called to testify about the 2018 DNA report. Over confrontation objections, each technical reviewer was permitted to testify about the analysis and conclusions in those respective reports, although neither report was entered into evidence.

Ms. Hurley testified about her training, including continuing education and periodic proficiency testing, and the quality control procedures that must be followed to ensure that the Crime Lab maintains its certification. She then described the manner in which DNA testing and analysis is performed and the tasks of a technical reviewer. Among other things, Ms. Hurley explained that a technical reviewer, in consultation with the analyst (in this case, Ms. Gray), "will look at the data when it comes off of the instrument" to ensure that it is usable and "of good quality." Then, after the analyst has completed her laboratory

work, performed statistical analysis of the data, and written her report, the technical reviewer examines the entire case folder and "will go through all of the conclusions that the analysts made," "ensure that those conclusions reflect what's in the data," and then "check to make sure that the report also reflects those conclusions accurately." Thus, "the technical reviewer can attest to the accuracy of the results."

Although Ms. Hurley acknowledged that all "the conclusions in the report are Suzanne Gray's conclusions" and that, by signing the report, Ms. Gray took "ownership of all" its conclusions, she explained that, after thoroughly examining all the documentation and analysis accompanying that report, Ms. Hurley agreed with its conclusions. Ms. Hurley described the results of the DNA testing and stated that she signed the Forensic Biology Document Checklist, indicating that she was "certify[ing] the accuracy of the conclusions that Ms. Gray drew in this case."

Ms. Sladko, like Ms. Hurley, testified about her training, continuing education, and periodic proficiency testing, and the quality control procedures that she was required to follow, as well as the procedures a technical reviewer follows. In particular, Ms. Sladko testified that "[o]nce the analyst has completed [her] interpretation and written [her] report and completed [her] case file," the technical reviewer "will go through the entire case file." The technical reviewer examines "all of the raw data that was created based off of the evidence," goes "through all of the conclusions," and makes "sure that those conclusions are supported by the data." And then, if the technical reviewer agrees with the analyst's conclusions, she will "sign off on that."

Ms. Sladko compared the DNA profiles derived from the 2017 tests with those from the 2018 tests. She opined that Burroughs's DNA was detected in both the "non-sperm fraction" and "the sperm fraction" derived from a perianal swab taken from the SAFE kit; that appellant's DNA was detected in swabs from the victim's left temple; and that Burroughs's DNA was detected on the knife handle.

Analysis

Governing Legal Principles

The Confrontation Clause of the Sixth Amendment to the United States Constitution, enforceable against the states through the Fourteenth Amendment, provides that, in "all criminal prosecutions," an accused "shall enjoy" the right "to be confronted with the witnesses against him[.]" Article 21 of the Maryland Declaration of Rights similarly provides that in "all criminal prosecutions," an accused has a right "to be confronted with the witnesses against him" and "to examine the witnesses for and against him on oath[.]"

In its seminal decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court "held that, regardless of hearsay rules, the Confrontation Clause generally bars the introduction into evidence, at a criminal trial, of 'testimonial hearsay,' unless the defendant had a prior opportunity to cross-examine the declarant, and the declarant was presently unavailable to testify." *Rainey v. State*, 246 Md. App. 160, 172, *cert. denied*, 468 Md. 556 (2020) (quoting *Crawford*, 541 U.S. at 54). Although the Court in *Crawford* declined to set forth a "comprehensive definition of [a] 'testimonial'" statement, *Crawford*, 541 U.S. at 68, it did, nonetheless, set forth what it called a "core class" of such statements, namely,

affidavits, depositions, prior testimony, and confessions. *Rainey*, 246 Md. App. at 172 (citing *Crawford*, 541 U.S. at 51-52).

In the years following *Crawford*, the Supreme Court sketched the outlines of a test, known as the "primary purpose" test, for determining whether an out-of-court statement is "testimonial." *Rainey*, 246 Md. App. at 172; *see, e.g.*, *Davis v. Washington*, 547 U.S. 813, 822 (2006) (explaining that statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation[10] is to establish or prove past events potentially relevant to later criminal prosecution"). How the "primary purpose" test applies to scientific or forensic reports has sharply divided the Supreme Court since then. Maryland courts have discussed these divisions at length. *See, e.g.*, *Rainey*, 246 Md. App. at 173-77 (setting forth a summary of relevant decisions); *see also Leidig v. State*, 475 Md. 181, 206-33 (2021) (setting forth a detailed exposition of relevant decisions of both the Supreme Court and the Court of Appeals).

Ultimately, the Court of Appeals exercised its authority to interpret the Maryland Constitution in a manner different than its federal counterpart. The Court of Appeals declared that, "under Article 21 [of the Maryland Declaration of Rights], a statement contained in a scientific report is testimonial if a declarant reasonably would have

[10] In a footnote, the Court further explained that it referred to interrogation because the statements at issue had been "the products of interrogations" but that it did not mean to suggest "that statements made in the absence of any interrogation are necessarily nontestimonial." *Davis*, 547 U.S. at 822 n.1.

understood that the primary purpose for the creation of the report was to establish or prove past events potentially relevant to later criminal prosecution." *Leidig*, 475 Md. at 243.

An important issue has arisen in the post-*Crawford* landscape because modern forensic science often involves a sophisticated division of labor in collecting and preparing samples, performing laboratory testing, and drafting accompanying documentation. Namely, whose testimony is required under the Confrontation Clause if the prosecution wishes to introduce forensic evidence containing "testimonial hearsay?" For our purposes the most definitive answer to date has come from the Court of Appeals in *State v. Miller*, 475 Md. 263 (2021).

In *Miller*, the Court of Appeals clarified who may testify, consistently with the prosecution's obligations under the Confrontation Clause, about the conclusions in a forensic report. The question presented was "whether a trial court violates a criminal defendant's constitutional rights, where the court allows the technical reviewer of a report analyzing DNA evidence to testify about the results of that analysis, without requiring the primary author of the report to be available for cross-examination." *Miller*, 475 Md. at 266. Under the circumstances of that case, the Court held there was no confrontation violation.

Miller was, like this case, a cold case involving a sexual assault. After the victim had undergone a SAFE exam, a DNA analysis was performed on the rape kit thereby generated, and forensic scientists "generated a DNA profile from the evidence for an 'unknown male #1,' the presumptive assailant." *Id.* at 265. Nine years later, the Federal Bureau of Investigation's Combined DNA Index System ("CODIS") indicated a match

between Miller and "unknown male #1," leading to criminal charges against Miller in the Circuit Court for Baltimore City. *Id.*

Two reports concerning the DNA evidence in the case had been prepared by a forensic scientist, Thomas Hebert, who formerly had worked for the Forensic Services Division of the Baltimore City Police Department: "(1) a 2008 report stating that the DNA of 'unknown male #1' was identified on the evidence collected from [the victim] and her apartment; and (2) a 2017 report naming Miller as the source of that DNA." *Id.* at 266. By the time of Miller's trial, however, Mr. Hebert had left his position in Baltimore City and moved out of state. At Miller's trial, two other witnesses testified in his stead: "Kelly Miller (no relation to [the defendant]), who was the technical reviewer of the 2008 report, and Kimberly Morrow, who was the technical reviewer of the 2017 report." *Id.*

Miller challenged the testimony of Ms. Morrow, the technical reviewer of the 2017 report, on confrontation grounds.[11] The Court of Appeals rejected his challenge, reasoning that "Ms. Morrow's 'degree of involvement' in the creation of the 2017 report qualified her to convey the information in the report to the jury without violating Miller's rights to confrontation." *Id.* at 293. The Court emphasized that "Ms. Morrow's 'involvement' with the 2017 report required her to: (1) thoroughly review all the data that Mr. Hebert used; (2) independently determine whether or not Mr. Hebert's results and conclusions were correct; and (3) if they were correct, sign off on the report's issuance," all of which, taken

[11] Although at trial Miller had challenged the testimony of Ms. Miller, the technical reviewer of the 2008 report, he abandoned that challenge on appeal. *Miller*, 475 Md. at 276 n.12.

together, rendered her "the functional equivalent of a second author of the report and thus rendered her testimony concerning the information contained in the report nonhearsay." *Id.* Moreover, the Court found harmless the two instances where Ms. Morrow testified about Mr. Hebert's conclusions, reasoning that her "testimony as a whole established that she was conveying her independent opinions based on her technical review of the case file" and that there was "'no reasonable possibility' that these brief and isolated references to Mr. Hebert's conclusions 'may have contributed to the rendition of the guilty verdict.'" *Id.* at 302 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

Application to the Facts of this Case

Here, neither party disputes that the forensic reports at issue are "testimonial." The reports themselves were not introduced into evidence, and thus, the question becomes whether the two analysts who testified presented their own independent conclusions, based upon their technical reviews of the forensic reports, which is permitted under *Miller*, or whether instead they acted as mere conduits for the testimonial statements of Ms. Gray, the non-testifying analyst, which is not. *See*, *e.g.*, *Rainey*, 246 Md. App. at 184 n.15 (explaining that the Confrontation Clause bars testimony where an expert witness "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation") (citation and quotation omitted).

During her testimony, Hurley explained that, as the technical reviewer of the 2017 DNA report, she "look[ed] at the data when it [came] off of the instrument" to ensure that it was usable and "of good quality." Then, after Ms. Gray had completed her laboratory

work, performed statistical analysis of the data, and written her report, Ms. Hurley examined the entire case folder, traced "through all of the conclusions" that Ms. Gray had made, ensured "that those conclusions" reflected what was "in the data," and then "check[ed] to make sure that the report also reflect[ed] those conclusions accurately." Thus, as the technical reviewer of the 2017 DNA report, Ms. Hurley was able to "attest to the accuracy of" its results. Finally, Ms. Hurley signed the Forensic Biology Document Checklist, indicating that she was "certify[ing] the accuracy of the conclusions that Ms. Gray drew in this case." Therefore, as in *Miller*, Ms. Hurley may be regarded as "the functional equivalent of a second author of" the 2017 report, and accordingly, Ms. Hurley's testimony concerning the information contained in that report was nonhearsay. *Id.* Although Ms. Hurley acknowledged that all "the conclusions in the report are Suzanne Gray's conclusions" and that, by signing the report, Ms. Gray took "ownership of all" its conclusions, any error that may have resulted was harmless because it is clear that her "testimony as a whole established that she was conveying her independent opinions based on her technical review of the case file."[12] *Id.* at 302.

The same analysis applies to Ms. Sladko's testimony concerning the 2018 DNA report. She, too, as the technical reviewer of that report (and as she testified), was required "to: (1) thoroughly review all the data that [Ms. Gray] used; (2) independently determine whether or not [Ms. Gray's] results and conclusions were correct; and (3) if they were correct, sign off on the report's issuance," all of which, taken together, rendered her "the

[12] We further note that trial in this case was held prior to the date *Miller* was decided.

functional equivalent of a second author of the [2018] report and thus rendered her testimony concerning the information contained in the report nonhearsay." *Id.* at 293.

Because the testimony of the technical reviewers of the DNA reports in this case complied with *Miller*, we hold that appellant's right to confrontation was not infringed.

III.

Parties' Contentions

Appellant contends that the circuit court erred in admitting his prior convictions and those of his co-defendant[13] for similar sexual offenses, as proof of lack of consent in this case. He argues there was an appeal pending in the prior cases, and the court failed to ascertain that the prior convictions were not final. The State counters that this claim was waived because appellant failed to alert the court to this specific ground for inadmissibility until after the court had ruled to admit the evidence. Furthermore, the State asserts, the circuit court stated unequivocally that it did not consider the prior convictions as evidence of lack of consent. Given that this was a bench trial, the State contends that we should defer to the circuit court's disclaimer and find any error harmless.

Factual Context

The State invoked Maryland Rule 5-404(b) and Courts & Judicial Proceedings Article ("CJ"), § 10-923,[14] and filed notice of its intent to introduce evidence of appellant's

[13] One of co-defendant Burroughs's prior convictions was for conspiring with appellant to commit a sexual offense.

[14] Section 10-923 of the Courts & Judicial Proceedings Article, effective July 1, 2018, 2018 Md. Laws, ch. 362, provides:

(continued)

(a) In this section, "sexually assaultive behavior" means an act that would constitute:

(1) A sexual crime under Title 3, Subtitle 3 of the Criminal Law Article;

(2) Sexual abuse of a minor under § 3-602 of the Criminal Law Article;

(3) Sexual abuse of a vulnerable adult under § 3-604 of the Criminal Law Article;

(4) A violation of 18 U.S.C. Chapter 109A; or

(5) A violation of a law of another state, the United States, or a foreign country that is equivalent to an offense under item (1), (2), (3), or (4) of this subsection.

(b) In a criminal trial for a sexual offense listed in subsection (a)(1), (2), or (3) of this section, evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible, in accordance with this section.

(c)(1) The State shall file a motion of intent to introduce evidence of sexually assaultive behavior at least 90 days before trial or at a later time if authorized by the court for good cause.

(2) A motion filed under paragraph (1) of this subsection shall include a description of the evidence.

(3) The State shall provide a copy of a motion filed under paragraph (1) of this subsection to the defendant and include any other information required to be disclosed under Maryland Rule 4-262 or 4-263.

(d) The court shall hold a hearing outside the presence of a jury to determine the admissibility of evidence of sexually assaultive behavior.

(e) The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that:

(continued)

and Burroughs's prior convictions in two 2018 sexual assault cases, to prove the victim's lack of consent in this case. During a pretrial motions hearing, the State moved in limine to admit the evidence of the prior convictions. Counsel for both co-defendants argued strenuously against admission, primarily on the ground that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The court deferred its ruling until the State sought to admit the evidence during trial.

At the beginning of trial, before opening statements, the State moved to introduce the evidence at issue, and a bench conference ensued. Counsel for both co-defendants raised the same objection they had raised during the motion in limine regarding the danger of unfair prejudice and contended that the State had failed to comply with the statutory

(1) The evidence is being offered to:

(i) Prove lack of consent; or

(ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;

(2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;

(3) The sexually assaultive behavior was proven by clear and convincing evidence; and

(4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

obligation to provide related discovery materials.[15] The court granted the State's motion, and redacted true test copies of the convictions were admitted into evidence, subject to a limiting instruction (for the benefit of co-defendant Burroughs) that the court would give at the time they were admitted and then again during instructions at the conclusion of Burroughs's trial. The court granted appellant "a continuing objection on this matter."

The day after the jury was sent to deliberate in Burroughs's case, and after the State had rested in appellant's case but before he elected to testify, appellant moved for a mistrial, contending that the trial court had erred in admitting the evidence at issue. In that motion, appellant raised a new ground for inadmissibility of his prior convictions, namely, that they were pending on appeal. The court denied the motion for mistrial, explaining:

> This is a bench trial and I have been careful really not to review the evidence as it's been introduced, so I've not looked at the True Test copy of the conviction and I think this really goes to, since it's a bench trial, what I rely on in making my decision and what I don't.
>
> Clearly, I had knowledge of the prior conviction even in terms of when we completed the pretrial motions and I asked the State if it had made [a plea] offer and whether or not the Defense was accepting that offer. So I had knowledge of it sort of that way. So I am denying it.
>
> What I tend to do when there is a bench trial, and I think I have mentioned this earlier, is I'm going to take all of the evidence and review it once the jury has finished with it in the Burroughs matter. And in my rulings, I try to be very careful in determining what I rely on and what I don't. And I'll be really clear about that.

[15] Appellant and Burroughs had been represented by the same attorneys in both the prior cases and this case, and the court therefore concluded that there had been no prejudice resulting from any possible discovery violation.

Thereafter, appellant testified, the defense rested, and the court recessed because the jury was still deliberating in Burroughs's case and had possession of the evidence. Three weeks later (after the jury had rendered a verdict in Burroughs's case), the court reconvened, heard closing argument from counsel, and reviewed the evidence. It then announced its verdict, finding appellant guilty of first-degree sexual offense and related offenses, and further declared:

> I want to make one other thing clear. I talked about the evidence that I did consider. I do want to say the evidence that I didn't consider. And you know, the State perhaps had its reasons, but I did not consider the prior convictions, did not.
>
> The Courts and Judicial Procedures (sic) section has this special carve out, I'm going to call it, of other crimes evidence or pattern evidence where it comes to sex offense crimes. And it's a relatively new statute, and there really isn't any reported case law on it, but it's there, and the State insisted on using it. And the Courts and Judicial Procedures (sic) say that the court -- that the State can.
>
> But, Mr. [defense counsel], your belated objection had far more teeth than your original objection. Your belated objection that the case was on appeal was the one that should have -- you should have made initially because if I draw a parallel to impeachment evidence, you can impeach a witness with a crime of moral turpitude as long as that crime isn't up on appeal. That was the argument you should have made at first, but you waited until after I'd admitted it.
>
> So I didn't consider it. I didn't need to consider it. I needed only to consider only what evidence was before me. So I want to make it clear that I didn't consider that.
>
> * * *
>
> So I know there's no reported case law. But just when you think logically about the law, if Mr. [defense counsel] had made that objection initially, I would have absolutely sustained it. I didn't consider it. I didn't need to.

> But I just want to make that really clear for the record, you know, as much of what I did consider is what I didn't. I didn't need to go into anything that may or may not have happened on a different occasion with somebody else. I only needed to consider what the evidence and testimony was in this case. So thank you, everyone.

Analysis

Preservation

At the time the court ruled on the State's motion, neither defense counsel made any mention of the argument appellant now raises on appeal, that there was an appeal pending in the prior cases, which should have rendered them inadmissible. Appellant first raised this issue after the close of the State's case, well after the time the prior convictions were admitted into evidence, which was too late to satisfy the contemporaneous objection rule. This claim, therefore, is not preserved. *See, e.g., Klauenberg v. State*, 355 Md. 528, 541 (1999) (declaring that "when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal") (citations omitted).

Harmless Error

The trial court expressly stated that it had not considered appellant's prior convictions in deciding in this case. Moreover, in doing so, the court stated its agreement with appellant's belated objection, which is the same ground he now raises on appeal. As we explain, the court's declaration ensures that any error that possibly occurred through admission of the prior convictions was harmless.

The test for harmless error in Maryland criminal cases was stated in *Dorsey v. State*, *supra*, 276 Md. 638, and has been repeated (and applied) countless times since:

> [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. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Id. at 659 (footnote omitted).

Although that standard applies both to jury trials and bench trials, there is a "clear distinction" between the two modes of trial in assessing whether a trial error is harmless.[16] *Nixon v. State*, 140 Md. App. 170, 189 (2001). In reviewing a conviction following a jury trial, we must be able to declare, beyond a reasonable doubt, that the error had no influence on the jury's verdict, *Dorsey*, 276 Md. at 659. On review, following a bench trial, "the issue is whether or not the judge relied on improper evidence," and we give deference to "a trial judge's specific statement on the record that the court was not considering certain testimony or evidence."[17] *Nixon*, 140 Md. App. at 189 (citing *Williams v. Higgins*, 30 Md. 404, 407 (1869)). We defer to the trial court's declaration that it did not consider the

[16] In *Williams*, *supra*, 567 U.S. 50, Justice Alito, in a plurality opinion announcing the Court's judgment, similarly observed that "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Id.* at 69 (Alito, J., plurality op.) (quoting *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam)).

[17] This does not mean that the ultimate standard to establish harmless error is different in a bench trial as compared to a jury trial. Rather, it means that generally it is easier for the State to meet its burden to show that an error is harmless beyond a reasonable doubt in a bench trial, especially where, as here, the judge expressly disclaims taking consideration of the erroneously admitted evidence.

disputed evidence, and we conclude that any error in admitting it into evidence was harmless.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.