IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2007

NO. 14

STATE OF MARYLAND,

Petitioner/Cross-Respondent

v.

MAOULOUD BABY,

Respondent/Cross-Petitioner

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONER AND BRIEF OF CROSS-RESPONDENT

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STATEMENT OF THE CASE

The Statement of the Case is contained in the Brief of Petitioner at 1-3.

QUESTIONS PRESENTED BY PETITIONER

1. If a woman initially consents to vaginal intercourse, withdraws consent after penetration, and then is forced to continue intercourse against her will, is she a victim of rape?

2. Regardless whether the trial court erred in its answers to the jury's questions, did the Court of Special Appeals err in reversing Baby's convictions for first degree sexual offense and third degree sexual offense, which were unrelated to the subject matter of the jury's questions?

QUESTIONS PRESENTED BY CROSS-PETITIONER

3. Did the trial court properly exercise its discretion to allow the testimony of an expert in the area of post traumatic stress disorder and rape trauma syndrome?

4. Did the trial court properly exercise its discretion in choosing to dismiss a juror prior to deliberations?

STATEMENT OF FACTS

The facts relating to Reply Argument I. and II. are set out in the Brief of Petitioner at 4-15. As for the facts relating to the two issues raised in Baby's Cross-Petition (addressed in the Argument of Cross-Respondent III. and IV.), the State accepts the facts set out in the Court of Special Appeals' opinion, as supplemented and modified in the following Argument. *See* App. 23; E. 51.

REPLY ARGUMENT

I.

IF A WOMAN INITIALLY CONSENTS TO VAGINAL INTERCOURSE, WITHDRAWS CONSENT AFTER PENETRATION, AND THEN IS FORCED TO CONTINUE INTERCOURSE AGAINST HER WILL, SHE IS A VICTIM OF RAPE.

Baby contends that the relevant language in *Battle v. State*, 287 Md. 675 (1980), is not dicta, largely premised on the arguments made by appellate counsel in their briefs before the *Battle* Court. *See* Respondent's Brief at 15-16. As an initial matter, the holding of an appellate case is defined not by the arguments of appellate counsel, but by this Court's written opinions. Moreover, even considering the arguments made by Battle in his brief before this Court, Battle merely speculated that the jury may have been unsure whether consent could be withdrawn during sexual intercourse, and then mistakenly cited to *Hazel v. State*, 221 Md. 464 (1960), for the proposition that the answer was "no," even though, as the Court of Special Appeals acknowledged and Baby apparently concedes, *Hazel* does not control the issue. *See* App. 13; E. 41. More importantly, this Court in *Battle* did not itself attempt to interpret the jury's question, but held that "the combination of the ambiguous question, ambiguously clarified by the trial judge, and the answer create[d] sufficient confusion in this case to warrant reversal and a remand for a new trial." *See* 287 Md. at 685. Thus, the issue of post-penetration

withdrawal of consent was not squarely presented, nor was it decided. Even if the opinion in *Battle* was premised on an accurate restatement of the common law, the aspect of common law rape at issue here should be rejected.

Baby misapprehends the State's discussion of some of the philosophical underpinnings of common law rape. *See* Respondent's Brief at 18-19. The State's contention, based upon the research of Professor Anne M. Coughlin, is that it is instructive to examine, "from the perspective of a system that forbade all heterosexual intercourse outside of marriage," how the substance of rape doctrine may have been influenced by the culture in which it arose. Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1, 27-29 (1998). Viewing rape from this perspective makes some of the idiosyncracies of common law rape more understandable, such as the tendency of the common law to put the rape victim on trial by questioning whether she physically fought off her attacker or caused the rape to occur by her choice of clothing. *See id.* at 7-8.

Notably, Baby does not respond to the State's argument that common law rape is based upon archaic stereotypes of women. *See* Petitioner's Brief at 24-26. Rather, he argues that the common law rule that he asserts is presented in *Battle* is "adequate" and "easy to apply," and suggests that, rather than recognizing post-penetration rape, simple assault could be charged. (Respondent's Brief at 33-34). To the extent that the common law fails to recognize post-penetration rape, it is certainly not "adequate" to address the

crime committed by the attacker, or the harm caused to the victim. *See* Comment, *Yes, Then No, Means No: Current Issues, Trends, and Problems in Post-Penetration Rape*, 25 N. Ill. U. L. Rev. 151, 169-70 (Fall 2004) (noting that the emotional anguish experienced by rape victims is often similar, regardless whether consent was withdrawn before or after penetration). Moreover, charging post-penetration rape as simple assault fails to accurately reflect the nature of the crime, and precludes application of the requirement that the sex offender be registered.

Explicit recognition by this Court of post-penetration rape would be entirely consistent with Maryland law. The State has to prove, beyond a reasonable doubt, that the defendant had vaginal intercourse with the victim, that the act was committed by force or threat of force (greater than or different from the force needed to accomplish the sex act itself), and that the act was committed without the consent of the victim, regardless whether consent was withdrawn before or after penetration. Baby repeatedly argues, however, that any rule should "explicitly provide" that the man understood that the woman wanted him to stop, and that he had a reasonable time to "fully understand" the request to stop and "respond appropriately." *See* Respondent's Brief at 35, 38. Juries in rape cases have long been entrusted to determine whether sexual intercourse was without consent, however. As the court observed in *State v. Robinson*, 496 A.2d 1067, 1071 (Me. 1985): "The determination of when

ongoing sexual intercourse is transformed from a consensual joint exercise to unilateral action by one party forced upon an unwilling partner is little different from the determination that has to be made" in the context of "date rape," where the initial sexual activity may have been consensual, but the victim withdraws consent just prior to penetration. As there are no special requirements in the context of pre-penetration withdrawal of consent such as those suggested by Baby, there is no need for such requirements in the context of post-penetration rape.

Moreover, although Baby denies that he subscribes to the "unstoppable male" theory, his insistence that a man must be given time to "fully understand" and "respond appropriately," when the victim has communicated her withdrawal of consent suggests otherwise. *See* Respondent's Brief at 38 & 38 n.6. Baby states that "[s]tudies make clear that a sexually aroused person is subject to strong physical and psychological influences." *Id.* at 38 n.6. While this is undoubtedly true, it does not suggest that there is a legal imperative that a man be given some indeterminate time to delay after the withdrawal of consent to intercourse, during which he may, by force or threat of force, continue intercourse with impunity. Baby's reference to the studies on the development of the adolescent brain likewise do not support his position. *See id.* While the executive functioning portion of the adolescent brain is not fully developed and adolescents may have a propensity to take

risks, that does not signify that adolescents cannot be expected to have self-control when a sexual partner says "no." Similar to pre-penetration withdrawal of consent cases, "Just where persuasion ends and force begins . . . is essentially a factual issue[.]" *State v. Rusk*, 289 Md. 230, 246 (1981).

Finally, Baby's asserts that the recognition of post-penetration rape "would constitute a change in the elements of rape," and concludes that this type of change in the common law should only be given prospective application. (Petitioner's Brief at 41-42). As a preliminary matter, post-penetration rape does not change the elements of rape. On the contrary, a new element would have to be added to rape if this Court were to require that, after a woman withdraws consent, penetration must be accomplished again. As previously argued, Maryland's rape statute does not limit withdrawal of consent to the moment of penetration. *See* Petitioner's Brief at 27-30. To the extent the legislature has not addressed the issue of post-penetration withdrawal of consent, it is left to common law development, and this Court's decision is fully applicable to this case, just as a change in the common law was made applicable to the cases before it that are cited in the Brief of Petitioner at 31-32.

II.

REGARDLESS WHETHER THE TRIAL COURT ERRED IN ITS ANSWERS TO THE JURY'S QUESTIONS, THE COURT OF SPECIAL APPEALS ERRED IN REVERSING BABY'S CONVICTIONS FOR FIRST DEGREE SEXUAL OFFENSE AND THIRD DEGREE SEXUAL OFFENSE, WHICH WERE UNRELATED TO THE SUBJECT MATTER OF THE JURY'S QUESTIONS.

Even assuming that the trial court erred in its responses to the jury's questions, the error only affects Baby's conviction for first degree rape. Baby argues that, because the prosecutor was unwilling to take a partial verdict on one count when the jury was deadlocked on the remaining counts at Baby's first trial, the counts must have been "interrelated and could not be separated." (Respondent's Brief at 44). That the State may have wished to retry the charges together, however, does not address the fact that the reversal of Baby's convictions following his second trial was based solely on the trial court's answer to the jury's questions about the law of rape.

Baby also contends that the Court of Special Appeals "suggested" that the jury was seeking clarification about the effect of withdrawal of consent on all the counts. (*Id.*). The Court of Special Appeals found, however, that "[a] fair interpretation of the jury's question is that it was an inquiry as to the legal effect of a withdrawal of consent *subsequent to* penetration, and prior to climax." (App. 11; E. 39). Clearly, the lower appellate court found that the

jury's questions pertained to the withdrawal of consent during sexual intercourse.

Finally, Baby observes that the jury must have been in need of guidance when it asked "about the law governing the withdrawal of consent following penetration in a rape case[,]" and that it did not receive that guidance. (Respondent's Brief at 44-45). Baby fails to explain his conclusion that the trial court's "refusal" to answer the jury's questions "likely had an influence on the jury's deliberations and caused one or more jurors to change his or her vote on the disputed counts from not guilty to guilty." As the jury questions concerned only the rape charge, the jury's deliberations would not have been affected by the trial court's answers to its questions. Moreover, there was a gap in the time between the occurrence of the first and third sexual offenses and the rape. Accordingly, there is no reason to reverse Baby's convictions for first and third degree sexual offense.

ARGUMENT OF CROSS-RESPONDENT

III.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO ALLOW THE TESTIMONY OF AN EXPERT IN THE AREA OF POST TRAUMATIC STRESS DISORDER AND RAPE TRAUMA SYNDROME.

Prior to Baby's first trial, his attorney filed a written motion in limine to exclude the testimony of Dr. Ann Burgess on grounds that her testimony was "hearsay," "speculative," "irrelevant," "highly prejudicial," and "would

go beyond the facts in the case." (E. 54). At a hearing on the motion, defense counsel argued that Dr. Burgess should not be allowed to testify because she had not interviewed or examined J.L., and that a "general explanation of Post Traumatic Stress Disorder and how the psychological symptoms are manifested in the reactions of rape victims" was not specific to the case. (E. 56). Defense counsel concluded that Dr. Burgess' testimony "would be hearsay, irrelevant; highly, highly, highly prejudicial, because she never participated in the examination of this particular victim," and that the testimony would "bolster[]" the State's argument that the victim "may or may not have done or said certain things" that the jury should decide. (E. 56-57).

The prosecutor responded that "[t]he case law in Maryland is pretty clear" and referred specifically to this Court's decision in *Hutton v. State*, 339 Md. 480 (1995),

> . . . [which] instructs us that this is precisely how Rape Trauma Syndrome evidence can be used. It, coincidentally, cannot be used the way [defense counsel] purports; that you cannot have someone interview a victim, and then retrospectively say, "Yes, I think they were raped." That's exactly what gets a prosecutor in trouble.
>
> What the Court of Appeals in Maryland has authorized is exactly what we intend to use Dr. Bergus [sic] for, which is to explain what Rape Trauma Syndrome is, to explain how a victim reacts to being raped, and how mythology, how old wives' tales tend to – jurors tend to feel that a woman would react in a stereotypical fashion, when, in fact, they do not. All of that adds

> sort of texture and context to how a rape victim, in this particular case, this rape victim has behaved post-rape.

(E. 57-58). The trial court ruled:

> It's my belief that the case law does specifically authorize testimony on this issue, so long as is [sic] used to explain the syndrome and the behavior that's part of the syndrome, as opposed to saying "This victim was raped because she did this." That's what they can't do. But they can offer testimony as to what Post-traumatic Stress Disorder is, what Rape Trauma Syndrome is, when it's relevant to certain issues in the case.

(E. 58). The trial court added that the State would have to provide an evidentiary foundation for the witness' testimony. (E. 58-59).

Dr. Burgess, a professor of psychiatric nursing at Boston College and a social scientist, testified about her academic achievements and her considerable research and clinical experience in the area of rape. (E. 135-43). The trial court accepted Dr. Burgess as "an expert in the area of post-traumatic stress disorder and in rape trauma syndrome." (E. 313). Based on her research and experience, Dr. Burgess described rape trauma syndrome; post traumatic stress disorder (PTSD); and answered specific questions and two hypotheticals formulated by the prosecutor, which were based on evidence that had been adduced at trial, regarding whether certain behaviors were consistent or inconsistent responses to rape trauma syndrome or PTSD. (E. 319-48).

In this Court, Baby raises a number of challenges to Dr. Burgess's testimony. *See* Respondent's Brief at 45-59. As the Court of Special Appeals

properly held: "Pellucidly, the facts presented in the case *sub judice* are quintessentially the circumstances contemplated by Maryland authorities which have considered the rape trauma syndrome." (App. 24; E. 52).

"[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Oken v. State*, 327 Md. 628, 659 (1992) (quoting *Stebbing v. State*, 299 Md. 331, 350, *cert. denied*, 469 U.S. 900 (1984)), *cert. denied*, 507 U.S. 931 (1993). *Accord Thanos v. State*, 330 Md. 77, 95 (1993); *Simmons v. State*, 313 Md. 33, 43 (1988). Maryland Rule 5-702 sets out the standard for admissibility of expert testimony:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Three decisions of this Court are particularly instructive regarding the admissibility of Dr. Burgess's testimony. In *State v. Allewalt*, 308 Md. 89 (1986), expert testimony by a psychiatrist, Dr. Spodak, was admitted at Allewalt's trial for second-degree rape and related offenses. Dr. Spodak was permitted to define post traumatic stress disorder (PTSD) and explain that it

could be caused by a trauma, such as a rape. Dr. Spodak testified that he had examined the victim at the State's request, elicited her history at the examination, and reviewed some of the case materials. He then opined that the victim suffered from PTSD based "for the most part" on the history she had reported. When asked what the triggering trauma would be, Dr. Spodak replied that "[t]he only trauma that she claims that she went through at that time was being raped." 308 Md. at 93-96.

On appeal, this Court upheld the admission of the expert testimony, noting that PTSD is a recognized anxiety disorder, and that Dr. Spodak had not presented "a kind of mystical infallibility" or "purport[ed] to have invented a scientific test for determining consent." *Id.* at 99-102. This Court rejected what it termed Allewalt's "strawman" argument that "PTSD evidence is not accepted in the relevant scientific community 'as a reliable means of identifying the underlying trauma,'" because Dr. Spodak's testimony was not offered for that purpose. Rather, the "jury, with the assistance of a competent expert, c[ould] understand that a diagnosis of PTSD tends to negate consent where the history, as reviewed by the expert, reflects no other trauma" that would cause the disorder. *Id.* at 103, 109. As Dr. Spodak had specifically identified rape as the cause for the victim's PTSD, this Court was careful to point out Dr. Spodak's testimony that "severe traumas, other than rape, can

produce" PTSD, and that the expert had not attempted to "express a personal opinion" on the victim's credibility. *Id.* at 108-09.

The next opinion by this Court to consider the admissibility of expert testimony on PTSD was *Acuna v. State*, 332 Md. 65 (1993). There, the expert witness, Dr. Gail Walter, defined PTSD for the jury, and stated her opinion that the behaviors she observed when she met with the child sexual abuse victim were consistent with PTSD. *Id.* at 69-70 (1993). Acuna argued primarily that the expert testimony was "'evidentiarily meaningless' unless the symptoms of PTSD 'were either actually or inferentially connected to the sexual offenses on which [Acuna] was standing trial.'" *Id.* This Court upheld the admission of the expert testimony, holding that, "as in *Allewalt*, the expert was able, through history, to connect the PTSD to the criminal conduct charged." *Id.* at 71.

The most recent opinion of this Court to consider the admissibility of expert testimony regarding PTSD and rape trauma syndrome is *Hutton v. State*, 339 Md. 480 (1995). There, Dr. Davis, an expert in clinical psychology with a specialty in child sexual abuse, went beyond the permissible bounds of testifying about the symptoms of PTSD and the consistency of the child-victim's history with PTSD when she was erroneously allowed to testify that the child-victim, whom she had treated and for whom she had supervised treatment, was experiencing the symptoms of PTSD because of child sexual

abuse based primarily on what the victim had told her. *Id.* at 488-90, 504-05. Moreover, Dr. Davis explained how she judged whether someone is credible and concluded that "the victim's symptoms were not 'in any way faked.'" *Id.* at 505.

This Court reversed Hutton's convictions, finding that the expert opinion in that case went "beyond explaining the characteristic elements of PTSD and relating the victim's behavior to them" by stating that the victim's behaviors were caused by sexual abuse, that the child's behaviors were not faked, and by describing how she determined the victim's credibility. *Id.* at 501. This Court noted that, reminiscent of *Bohnert v. State*, 312 Md. 266, 276-77 (1988), such testimony invaded the province of the jury and vouched for the victim, and that, "unlike *Allewalt*, in which the critical event, *i.e.*, sexual intercourse, was conceded," the expert testimony was offered to prove that the abuse occurred, rather than "to rebut a contention that it never occurred." *Id.* at 501, 505.

Significantly, this Court in *Hutton* continued, explaining:

> Expert testimony describing PTSD or rape trauma syndrome may be admissible, however, when offered for purposes other than simply to establish that the offense occurred. The evidence might be offered, for example, to show lack of consent or to explain behavior that might be viewed as inconsistent with the happening of the event, such as a delay in reporting or recantation by the child.

Id. at 504 (citing *People v. Taylor*, 552 N.E.2d 131, 136-38 (N.Y. 1990)). This Court further observed that such testimony is admissible to educate the jury "'by disabusing [it] of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.'" *Hutton*, 339 Md. at 507 (citation omitted). Expert testimony is also admissible to supply the jury with general information about PTSD, without offering an opinion as to whether a particular person has, in fact, experienced the relevant stressor. *Id.* (citation omitted). The *Hutton* Court further explained:

> Just as a jury can understand that evidence of the complainant's hysteria shortly following an alleged sexual assault tends to negate consent, so a jury, with the assistance of a competent expert, can understand that a diagnosis of PTSD tends to negate consent where the history, reviewed by the expert, reflects no other trauma which in the expert's opinion could produce that medically recognized disorder.

Id. at 506.

In this case, Dr. Burgess properly testified about the general characteristics of rape trauma syndrome and PTSD. She answered questions and hypotheticals posed by counsel that were based upon the evidence, in a manner similar to that approved in *Allewalt, Acuna*, and *Hutton*. Unlike the erroneously admitted expert testimony in *Hutton*, Dr. Burgess did not testify that J.L.'s behavior was like that of other rape victims, nor did she conclude that the cause of J.L.'s behaviors was rape or vouch for J.L.'s credibility.

Indeed, she did not even examine J.L., and thus did not testify about her behaviors or her credibility specifically. Although Dr. Burgess testified that she had reviewed some of the case materials prior to her testimony, (E. 315), she made no mention of them, or any of the facts in the case, during her testimony. Rather, the evidence that was adduced from the victim and other witnesses at trial formed the basis for the prosecutor's questions about the consistency with rape trauma syndrome of certain behaviors during and immediately after the rapes, and the consistency of some longer-term symptoms with PTSD, with no specific reference to J.L. or her particular circumstances.

Dr. Burgess was highly qualified by her training and experience to testify about both rape trauma syndrome and PTSD. Dr. Burgess testified that she holds a doctor of nursing science degree and is a professor of psychiatric nursing at Boston College. (E. 307). Among her honors, Dr. Burgess held the first endowed chair in psychiatric nursing at the University of Pennsylvania, received the Epstein Award for her work in the field of rape, and was named psychiatric nurse of the year. (E. 308-09, 311). Dr. Burgess's research and clinical experience in the area of rape began in the 1970's, and continued over the next thirty years. (E. 309-10). In that time, Dr. Burgess has published approximately ten books in her specialty area of rape and upwards of 120 professional articles. (E. 312, 318). She had been previously qualified as an

expert several hundred times in 28 states (including Maryland), and in the Virgin Islands, and had testified in criminal cases for both the State and the defense, as well as in civil cases. (E. 312-13).

Dr. Burgess's testimony about rape trauma syndrome was as follows. The prosecutor asked Dr. Burgess whether she was familiar with the term "rape trauma syndrome." (E. 317-18). Dr. Burgess testified that in 1974, she and Dr. L[y]nda Holstrom coined the term in a study published in the American Journal of Psychiatry "as the term of the response patterns" they had observed through a rape counseling program they operated at Boston City Hospital. (E. 318).[1] Dr. Burgess testified that since that time, she has continued to work with "thousands" of rape victims and continued her research in the area of rape, which would be the "foundation for the positions" she was going to take in her trial testimony. (E. 318). Rape trauma syndrome is not a disease or disorder; it is a description of behaviors that rape victims commonly exhibit. *See* Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 Am. J. Trial Advoc. 591, 630 (2000).

Dr. Burgess discussed some of the common misperceptions about rape victims, such as the assumption that a rape victim should act a certain way, or

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[1] This was approximately six years before PTSD came "into the literature." (E. 318).

was at fault because of something she wore, where she was, or what she was doing that set the rape in motion. (E. 319).[2] Dr. Burgess also testified that there is no specific way that rape victims react, but that her research had revealed "common patterns and common responses." She noted that there are differences depending on the "context" and the "individual person." (E. 320). Dr. Burgess described three stages of rape trauma syndrome, the impact phase, the acute phase of disorganization, and the reorganization phase. (E. 320-21).

The prosecutor then posed questions to Dr. Burgess about whether it was "consistent or inconsistent" with rape trauma syndrome for a victim to exhibit various behaviors before, during and immediately after the rape. For example, under questioning, Dr. Burgess testified that it was not inconsistent with rape trauma syndrome for a victim not to suffer physical injuries, fail to call for help, feel psychologically exhausted during the events, try to accommodate the rapist, fail to immediately report the rape, and engage in routine behavior immediately after the rape. (E. 322-25, 328, 333, 335-36, 345-46). Dr. Burgess explained that these behaviors are consistent with rape trauma syndrome because a female rape victim may feel she is unable to physically resist the rapist, the shock of the events can overpower her, there is

[2] Baby continues to perpetuate the myth that the victim is to blame for bringing on the rapes at issue by repeatedly asserting that J.L. and Lacie "knew" he and Wilson "wanted to have sex," and that J.L. nevertheless "voluntarily drove the boys to a quiet area, parked, and climbed into the back seat between them." *See* Respondent's Brief at 10, 48.

a fear of making the rapist angry or upset, there is a fear of being injured, her ability to think clearly has been compromised, and she may wish to protect her privacy. (E. 321-36, 345-46).

The prosecutor's questions were based upon the victim's trial testimony about her behavior during and immediately after the rape, and the testimony rebutted Baby's defense that the victim consented to sexual intercourse because she did not offer strong physical resistence, scream for help, immediately call 911, and so on. (E. 117, 294-96, 299-300; T. 12/20/04 at 241, 245, 262-64, 266). Indeed, Baby's defense was based in large part on popular rape mythology. In opening statement, he said that the victim "wanted it." (T.12/13/04 at 213). Through cross-examination and argument, Baby suggested that there was no rape because the victim was wearing an "orange rhinestone thong," there was an empty box of condoms in her purse, she was not a virgin, she did not have any bruises, her clothing was not torn, there was no weapon used, Baby "couldn't have made it any clearer" that he wanted sex, and that Baby was "juiced up" and "wanted sex . . . badly." (E. 243-46; T.12/20/04 at 237-38, 240-43, 245-49, 252, 255-56, 258, 260-64, 267). As this Court stated in *Hutton*, the testimony was admissible to educate the jury "'by disabusing [it] of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.'" *See* 339 Md. at 507 (citing *Taylor*, 552 N.E.2d at 136-38).

Dr. Burgess also testified about PTSD.[3] She explained that PTSD is a classification of a psychiatric disorder that comes under anxiety disorders. (E. 315). A diagnosis includes identifying a "stressor and then there are a series of symptoms that fall into certain categories that you have to be able to identify in the person that you're examining." (E. 316). Dr. Burgess explained that the stressor for PTSD could be "natural," such as hurricanes or floods; "vehicular," like automobiles and airplanes; or interpersonal, as in combat stress, torture, experiencing the homicide of a family member, rape, or any type of crime. (E. 316-17). She explained that the main source for diagnosing disorders comes from the Diagnostic and Statistical Manual. (E. 316).

With regard to PTSD, Dr. Burgess answered questions about whether various symptoms were consistent with PTSD, such as a person having a spotty memory of the events, re-experiencing the fear of the rape, repetitive mannerisms such as twirling the hair, difficulty regulating mood, and trouble concentrating. (E. 329-30, 331-32, 336, 341). The factual basis for the prosecutor's questions was based on the testimony of Paula Slan, the victim-

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[3] The prosecutor referred to rape trauma syndrome as being a subset of PTSD. (E.329). When rape is the triggering event for a diagnosis of PTSD, it is sometimes referred to as rape trauma syndrome. *See, e.g.*, *State v. Hall*, 412 S.E.2d 883, 889 n.3 (N.C. 1992). Rape trauma syndrome, however, is a description of the emotional and psychological reactions that a sexual assault victim may have before, during, and after the assault. *See* Garrison, 23 Am. J. Trial Advoc. at 601.

witness coordinator for the Montgomery County State's Attorney's Office, and the victim's father. J.L.'s father testified that the day following the rapes, J.L. was hysterically crying and was "balled up" with a coat covering her face. (T.12/17/04 at 83). J.L. continues to be withdrawn and depressed, and she avoids going out. (T.12/17/04 at. 84). Paula Slan testified when she met J.L. in December of 2003, she was uncommunicative, did not make eye contact, twirled her hair constantly, and had a flat affect. (T.12/16/04 at 235). J.L. again exhibited these symptoms at a second meeting in February of 2004, and J.L. was "sobbing" after a hearing in August of 2004. (T.12/16/04 at 236-38). The expert testimony regarding the generalities of PTSD, and whether certain symptoms were consistent with PTSD, was proper to rebut the defense of consent, just as it was in *Allewalt* and *Acuna*.

Based on her research and experience, Dr. Burgess was fully qualified to testify about the generalities of PTSD and rape trauma syndrome, and to answer specific questions, based on the evidence, about the consistency or inconsistency of certain behaviors and symptoms with RTS or PTSD. The testimony regarding rape trauma syndrome was relevant to explain the victim's behavior during and immediately after the rape so that the jury could evaluate the evidence free of the constraints of popular myths about rape and rape victims. The testimony regarding PTSD was relevant to explain that victims of trauma, generally, may manifest certain symptoms. The expert testimony

in this case was properly admitted for the precise reasons approved in *Hutton*, *i.e.*, "to show lack of consent and to explain behavior that might be viewed as inconsistent with the happening of the event[.]" *See* 339 Md. at 504.

Baby's contentions to the contrary lack merit. Similar to the "strawman" argument advanced by the appellant in *Allewalt*, 308 Md. at 103, Baby repeatedly asserts that Dr. Burgess expressed the opinion that J.L. was suffering from rape trauma syndrome, and argues that "the reliability of rape trauma syndrome evidence to prove rape has not been established." *See* Respondent's Brief at 49, 50, 53, 59. As the foregoing discussion of Dr. Burgess's testimony illustrates, she did *not* express an opinion about J.L. at all, much less that she was suffering from rape trauma syndrome or had been diagnosed with it. Indeed, as previously discussed, rape trauma syndrome it not a "disorder" that is "diagnosed." It is a description of common behaviors by rape victims.

Moreover, the evidence of rape trauma syndrome was *not* admitted to prove the rape occurred. Indeed, the trial court explicitly recognized that such testimony would be inadmissible. (E. 58). Rather, it was offered to rebut the defense of consent and explain the victim's behavior during the sexual assaults, which may have been perceived as inconsistent with rape given prevailing societal myths about rape and rape victims. Accordingly, the cases cited by Baby that hold that rape trauma syndrome is inadmissible to prove

rape are inapposite. *See* Respondent's Brief at 47, citing *People v. McDonald*, 690 P.2d 709, 724 (Cal. 1984) (rape trauma syndrome cannot be used as proof of guilt); *State v. Saldana*, 324 N.W.2d 227, 231-322 (Minn. 1982) (expert's opinion that victim was raped and had not fantasized rape were reversible error); *State v. Taylor*, 663 S.W.2d 235, 240 (Mo. 1984) (expert testimony that victim suffered from rape trauma syndrome and had been raped erroneously admitted); Respondent's Brief at 53-54, citing *People v. Bledsoe*, 681 P.2d 291, 301 (Cal. 1984) (en banc) (rape trauma syndrome not relied upon in scientific community to prove rape occurred); *State v. Middleton*, 657 P.2d 1215 (Or. 1983) (disapproving expert testimony on truthfulness of victim); *State v. Hall*, 412 S.E.2d 883, 890 (N.C. 1992) (testimony that victim suffered from PTSD inadmissible to show that sexual offense in fact occurred).

Baby argues that a portion of the prosecutor's closing argument supports his assertion that "Dr. Burgess rendered an opinion that L.J. [sic] had been raped." *See* Respondent's Brief at 51-52. As the jury was instructed, the closing arguments of counsel are not evidence. (T.12/20/04 at 199). In addition, Baby did not object to the argument at trial and has never raised it as grounds for reversal in the appellate courts, thus waiving the issue for appellate review. *See Stewart v. State*, 104 Md. App. 273, 288 (1995), *aff'd on other grounds*, 342 Md. 230 (1996).

In any event, the prosecutor's closing argument was properly based upon reasonable inferences drawn from the evidence. (T.12/20/04 at 231). Just prior to the portion of the argument that Baby has excerpted, *see* Respondent's Brief at 51-52, the State argued that Dr. Burgess's testimony "put everything into context, things that seemed unusual . . . and how you react in all kinds of ways." She then talked about the testimony of Paula Slan and the victim's father about J.L.'s emotional state even today, and tied it in with the expert's testimony about PTSD. (T. 12/20/04 at 230). Likewise, based on the reasonable inference from the evidence that J.L.'s behavior during and immediately after the rapes was consistent with rape trauma syndrome, the jury could conclude that J.L. was raped. Again, based on reasonable inferences from the evidence -- not the expert witness's testimony -- the prosecutor added: "We know who raped her: Michael Wilson and Maouloud Baby." (T. 12/20/04 at 231). This argument was entirely proper. *See Smith v. State*, 388 Md. 468, 487 (2005) ("Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom[.]") (quoting *Wilhelm v. State*, 272 Md. 404, 486-87 (1974)).

Baby also contends, again based on the false premise that Dr. Burgess expressed "her opinion that J.L. was suffering form [sic] rape trauma syndrome," that Dr. Burgess did not have an adequate basis for her opinion because she did not examine J.L., but instead relied on the "hearsay sources"

of the case materials. (Respondent's Brief at 49-51). As discussed, Dr. Burgess did not state an opinion about J.L. or that J.L. was suffering from rape trauma syndrome; she testified that certain behaviors posited by the prosecutor in questions were consistent with rape trauma. Moreover, Dr. Burgess, who coined the term, clearly had an adequate basis for her testimony about rape trauma syndrome given her extensive research, clinical experience, and expertise in the area of rape. In addition, as this Court in *Hutton*, *Acuna*, and *Allewalt* implicitly recognized, it is proper for experts to rely on out-of-court materials and statements to learn the victim's history. In this case, however, Dr. Burgess did not explicitly rely on any of the case materials during her testimony, but responded to various questions and hypotheticals that were based on the evidence and crafted by counsel. Dr. Burgess therefore had an adequate basis for her testimony.[4] *Accord State v. Freeney*, 637 A.2d 1088, 1095-97 (Conn. 1994) (hypothetical based on evidence did not comment directly or indirectly on victim's credibility); *People v. Lopez*, 800 N.E.2d 1211, 1220 (Ill. 2003) (approving introduction of rape trauma evidence

[4] Baby is incorrect when he adds that Dr. Burgess testified that "ignoring the statements by the Respondent and the other juvenile that they wanted to have sex, and her willingness to drive them to a quiet area, and get in the back seat were consistent with rape trauma syndrome." (Respondent's Brief at 48-49). The prosecutor's hypothetical *began* with information about the events leading up to the rapes, but the follow-up questions to the complete hypothetical did not ask Dr. Burgess whether these events were consistent with rape trauma syndrome. (E. 341-45).

through nonexamining experts); *State v. MacRae*, 677 A.2d 698, 701 (N.H. 1996) (State's questions of expert based on victim's particular behavior approved where expert had never met victim and did not testify about victim's credibility); *People v. Thompson*, 699 N.Y.S.2d 770, 772 (N.Y. App. Div.) ("Despite the fact that the expert did not examine or interview the victim," expert testimony on RTS admissible in State's case "as it was limited in scope to explaining 'behavior that might appear unusual to a lay juror not ordinarily familiar with the patterns of response exhibited by rape victims and particularly addressed the reasons a victim may be reluctant to initially identify a sexual attacker"), *cert. denied*, 731 N.E.2d 627 (N.Y. 2000).

Pointing to language in *Allewalt* and *Hutton*, Baby contends that Dr. Burgess's use of the term "rape trauma syndrome" was itself prejudicial because it conveyed that "a diagnosis had been made" that the victim was raped. (Respondent's Brief at 55-59). The concern noted in *Allewalt* and *Hutton* was that the use of the term "rape trauma syndrome" as a *substitute* for the term PTSD may itself be prejudicial because it equates the PTSD exclusively with the stressor of rape, thus leading to the conclusion that the PTSD was caused by rape. *See Allewalt*, 308 Md. at 108 (noting that use of term "rape trauma syndrome" rather than post-traumatic stress disorder may be unfairly prejudicial because it equates PTSD exclusively with rape); *Hutton*,

339 Md. at 492 n.9 (use of term rape trauma syndrome may be prejudicial, as recognized in *Allewalt*).

In this case, Dr. Burgess testified about rape trauma syndrome and about PTSD, but did not overlap the two terms. While the term "rape trauma syndrome" is sometimes used to describe a subset of PTSD where rape is the triggering event, it was not so used in Dr. Burgess's testimony. Based on her research and experience with rape victims, Dr. Burgess described rape trauma syndrome to the jury as the responses or behaviors that a victim of rape may exhibit during and after rape. (E. 145-46). Unlike PTSD, which is a diagnosis, Dr. Burgess did not use the term rape trauma syndrome as a diagnosis, *i.e.*, she did not testify that a collection of behaviors constituted rape trauma syndrome. Rather, Dr. Burgess described rape trauma generally and answered questions about the consistency of certain behaviors with rape trauma. She never examined the victim or testified about J.L.'s particular behaviors.

As for PTSD, Dr. Burgess explained that it is a disorder listed in the Diagnostic and Statistical Manual, and she noted that a number of stressors could trigger PTSD, including, for example, a natural disaster or an automobile accident. She thus avoiding equating a diagnosis of PTSD with rape both by testifying about PTSD generally, and by not testifying about J.L.'s particular symptoms. (E. T11. 143-46). As Dr. Burgess's testimony about rape trauma

syndrome was not offered as a diagnosis and she did not opine that the victim in this case suffered from rape trauma syndrome, the expert's use of the term did not prejudice Baby. Moreover, because the expert testimony assisted the jury in determining whether certain behaviors were consistent or inconsistent with being raped, the testimony was probative.

The State agrees with Baby, when he states:

> Dr. Burgess could have testified about her experience with rape victims and testified that many victims do not resist, do not immediately report it, and do things like give their phone number to the perpetrator. She could have described the stages of recovery that many rape victims go through. She could have stated that such behavior does not imply that the victim had consented.

(Respondent's Brief at 58-59). This *was* the substance of Dr. Burgess's testimony, not that she examined the victim or made a "diagnosis."[5]

Finally, Baby contends that the trial court erred in admitting Dr. Burgess's testimony because "the State did not present evidence in the Circuit Court that rape trauma syndrome was accepted by a specific scientific community as valid[.]" (Respondent's Brief at 45- 48). Baby never raised this issue in his written pretrial motion in limine, in his arguments before the circuit court or his objections at trial, in opening and reply briefs before the

[5] Indeed, to the extent that Dr. Burgess was not clear about the distinction between RTS and PTSD, Baby has not been prejudiced because Dr. Burgess did not testify that J.L.'s symptoms constituted a diagnosis of either PTSD or RTS.

Court of Special Appeals, or in his Conditional Cross-Petition for Writ of Certiorari to this Court. Indeed, Baby has never before even alluded to the *Frye-Reed*[6] test. Thus, the issue is not before this Court for review. *See State v. Lancaster*, 332 Md. 385, 402 n.12 (1993) (grounds must be raised in petition for writ of certiorari or in the Court's order granting certiorari review); *McElroy v. State*, 329 Md. 136, 146 (1993) (this Court will decline to address an issue not raised in Court of Special Appeals or in petition for certiorari); *Gonzales v. State*, 322 Md. 62, 69 (1991) (issue not presented in petition for writ of certiorari or in order granting writ will not be addressed).

Even if the scientific reliability of rape trauma syndrome were before this Court, this Court has explicitly, or at least implicitly, recognized rape trauma syndrome and its proper evidentiary value, which is not that it is a reliable means of identifying that rape has occurred, but that it may help explain an alleged rape victim's behaviors that may be popularly misconceived as inconsistent with the occurrence of rape. As this Court has recognized, the term "rape trauma syndrome" has been in use for over thirty years, and the admissibility of expert testimony about rape trauma has been the subject of many cases. *See Allewalt*, 308 Md. at 103-08; *Hutton*, 339 Md. at 491-95, 504-07. In *Hutton*, this Court stated that rape trauma syndrome may be

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[6] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Reed v. State*, 283 Md. 374 (1978).

admissible to show "lack of consent or to explain behavior that might be viewed as inconsistent with the happening of the event[,]" and its citation to *Taylor*, 552 N.E.2d at 136-38, as support for that view, is a tacit recognition that rape trauma syndrome evidence is scientifically reliable and admissible when offered to explain the behavior exhibited by the victim that might be viewed as inconsistent with a claim of rape. *See* 339 Md. at 504.

In *Taylor*, the appellate court reviewed the literature and case law relevant to rape trauma syndrome. 552 N.E. 2d at 133-35. The court noted that, "[w]hile some researchers have criticized the methodology of the early studies of rape trauma syndrome, [Drs.] Burgess and Holmstrom's model has nonetheless generated considerable interest in the response and recovery of rape victims and has contributed to the emergence of a substantial body of scholarship in this area[.]" *See id.* at 134 (and citations within). The *Taylor* court also determined that the syndrome's therapeutic origin did not render it unreliable for trial purposes where it is relevant to a disputed issue, and concluded that "evidence of rape trauma syndrome is generally accepted within the relevant scientific community[.]" *Id.* at 135. *Accord State v. Huey*, 699 P.2d 1290, 1294 (Ariz. 1985) ("An examination of the literature clearly demonstrates that the so-called 'rape trauma syndrome' is generally accepted to be a common reaction to sexual assault."); *People v. Hampton*, 746 P.2d 947 (Colo. 1987) (when evidence of rape trauma syndrome is limited as it is here,

majority of jurisdictions have held that evidence meets *Frye* test and is admissible), *abrogated on other grounds by People v. Shreck*, 22 P.3d 68 (Colo. 2001); *State v. Marks*, 647 P.2d 1292, 1299 (Kan. 1982) ("An examination of the [scientific] literature clearly demonstrates that the so-called 'rape trauma syndrome' is generally accepted to be a common reaction to sexual assault"); *Commonwealth v. Mamay*, 553 N.E.2d 945, 951 (Mass. 1990) ("A number of other courts and commentators . . . have recognized the scientific basis of rape trauma syndrome."); *State v. Liddell*, 685 P.2d 918, 923 (Mont. 1984) (Although rape trauma syndrome is a relatively new psychiatric development "the presence of rape trauma syndrome is detectable and reliable as evidence that a forcible assault did take place.").

The court in *Taylor* described the relevance of rape trauma syndrome evidence as follows:

> [R]ape is a crime that is permeated by misconceptions [citations omitted]. Society and law are finally realizing that it is an act of violence and not a sexual act. We noted in *People v. Liberta*, 64 N.Y.2d 152, 166 n. 8, 485 N.Y.S.2d 207, 474 N.E.2d 567 that "[t]he stigma and other difficulties associated with a woman reporting a rape and pressing charges probably deter most attempts to fabricate an incident; rape remains a grossly under-reported crime." Studies have shown that one of the most popular misconceptions about rape is that the victim by behaving in a certain way brought it on herself [citation omitted]. For that reason, studies have demonstrated that jurors will under certain circumstances blame the victim for the attack and will refuse to convict the man accused [citation omitted]. Studies have also shown that jurors will infer consent where the

> victim has engaged in certain types of behavior prior to the incident [citation omitted].

552 N.E.2d at 136. Recognizing that "cultural myths still affect common understanding of rape and rape victims[,]" and that the effects of rape on victims is therefore beyond the ordinary understanding of the lay juror, the court held that "the introduction of expert testimony describing rape trauma syndrome" was admissible in Taylor's trial to explain the alleged victim's seemingly inconsistent behavior. *Id.* at 136, 138. For example, the court upheld expert testimony that a rape victim who knows her assailant is more fearful of reporting his name and is less likely to report the rape at all, to explain why the victim was initially unwilling to identify the defendant as the attacker. Similarly, the court approved expert testimony that half of all rape victims do not appear to be upset following the attack to explain the victim's calm demeanor following the attack. *Id.* at 138.

Thus, the expert testimony was scientifically reliable and admissible in *Taylor* for precisely the same reasons that it was admitted here, *i.e.*, to assist the jury in understanding the victim's behavior where it is seemingly inconsistent with the occurrence of rape. A substantial body of case law has likewise approved the admission of expert testimony on rape trauma syndrome when it is offered for this purpose. *See, e.g., Huey*, 699 P.2d at 1294 (qualified expert testimony about rape trauma syndrome admissible where defense is consent) (en banc); *Bledsoe*, 681 P.2d at 298 ("expert testimony on rape

trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths") (en banc); *Hampton*, 746 P.2d at 952-53 (allowing expert testimony on RTS to explain the alleged victim's delay in reporting the crime, where defense indicated the reason for delay would be attacked at trial); *People v. Baenziger*, 97 P.3d 271, 275 (Colo. App.) (rape trauma evidence by expert was reasonably reliable and helpful to jury), *cert. denied*, 2004 WL 2029360 (Colo. 2004); *State v. Ali*, 660 A.2d 337, 349, 351-52 (Conn. 1995) (allowing expert testimony to explain the alleged victim's delay in reporting the crime, where defense indicated the reason for delay would be attacked at trial); *Lopez*, 800 N.E.2d at 1220 (State can introduce rape trauma syndrome evidence through testimony of nonexamining experts); *Simmons v. State*, 504 N.E.2d 575, 578-79 (Ind. 1987) (admitting evidence demonstrating victim's behavior was consistent with RTS was proper, when victim gave inconsistent statements); *State v. McQuillen*, 721 P.2d 740, 742 (Kan. 1986) (permitting expert testimony regarding the symptoms and behaviors outlined in literature as being consistent with rape trauma syndrome); *Mamay*, 553 N.E.2d at 951 ("[Dr. Ann] Burgess's expert opinion as to who generally is affected by the syndrome and the extent of the syndrome in the context of a trust relationship was based on her professional knowledge and experience and was clearly permissible"); *MacRae*, 677 A.2d

at 701 (where purpose of expert's testimony "was educational and was related to the testimony of this particular victim, but was not offered as proof that the victim in fact had been abused, it was proper"); *State v. Staples*, 415 A.2d 320, 322 (N.H. 1980) (where defense theory was memory loss and fabrication, proper to rebut using RTS to show memory loss was not unusual in rape victims); *People v. Nelson*, 837 N.Y.S.2d 697, 698 (N.Y. App. Div. 2007) (recognizing that admitting RTS testimony to explain behavior of victim was proper); *Hall*, 412 S.E.2d at 890-91 (evidence of rape trauma syndrome admissible to dispel common misperceptions about rape); *State v. Martens*, 629 N.E.2d 462, 467 (Ohio App. 1993) (rape trauma syndrome evidence is useful in criminal cases to explain victim's unusual behavior after the incident); *State v. Kinney*, 762 A.2d 833, 839-42 (Vt. 2000) (holding RTS evidence admissible in State's case to aid the jury in evaluating and for responding to arguments alleging victim behavior was inconsistent with rape); *State v. McCoy*, 366 S.E.2d 731, 737 (W. Va. 1988) (expert may testify that victim behavior consistent with rape trauma syndrome if defense is consent); *State v. Robinson*, 431 N.W.2d 165, 171-73 (Wis. 1988) (expert testimony helpful in "disabusing the jury of some widely held misconceptions about sexual assault victims"); s*ee generally* Garrison, 23 Am. J. Trial Advoc. at 629 (in an article from 2000, noting that since 1982, twenty-five states and the military have held expert testimony on RTS admissible, seven states have ruled

it inadmissible, and eighteen states and D.C. have not directly ruled on its admissibility).

"[R]ape myths insidiously infect the minds of jurors, judges, and others who deal with rape and its victims[,]" even though "[a] number of studies have demonstrated that many beliefs about sexual assault victims are overwhelmingly refuted by empirical data." *Robinson*, 431 N.W.2d at 172 n.7. In this case, in accordance with Maryland Rule 5-702, Dr. Burgess was qualified to testify about rape trauma syndrome; expert testimony about rape trauma syndrome was appropriate to help the jury understand that rape victims often do not react to rape in popularly stereotyped ways; and the evidence adduced at trial formed a factual basis to support the State's examination of Dr. Burgess. The trial court's exercise of discretion to admit the testimony should be upheld.

IV.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CHOOSING TO DISMISS A JUROR PRIOR TO DELIBERATIONS.

The second issue Baby raises in his Conditional Cross-Petition is that, even though the trial court ultimately granted Baby's request to excuse juror number 100 prior to deliberations, the trial court committed reversible error because it did not immediately grant the motion upon discovering that juror number 100 had read a newspaper article about the case during the trial. *See*

Respondent's Brief at 62. Specifically, Baby argues that the timing of the juror's dismissal from the jury was erroneous because there was a "risk that the juror would unfairly influence one or more of his fellow jurors by communicating to them information prejudicial to Respondent[.]" (*Id.*). As discussed below, Baby's assessment of the "risk" of juror number 100 unfairly influencing the other jurors is not supported by the record, and should be rejected. Indeed, because the juror did not deliberate, even he was not subject to being improperly influenced by the newspaper article he read.

A trial court's decision to remove a juror is discretionary and will not be reversed on appeal "absent a clear abuse of discretion or a showing of prejudice to the defendant." *State v. Cook*, 338 Md. 598, 607 (1995); *accord Diaz v. State*, 129 Md. App. 51, 59 (1999), *cert. denied*, 357 Md. 482 (2000). The trial court was well within her discretion in deciding not to excuse juror number 100 immediately, and Baby has failed to show that he was prejudiced by the court's decision.

After the jurors were sworn, the trial judge gave them some preliminary instructions, including the admonition that they should keep an open mind throughout the trial and not discuss the case "even among yourselves." (T.12/13/04 at 156). The trial judge also informed the jury that they should decide the case on the evidence presented, and "if there should be any press

coverage of the case, I[‘m] not necessarily expecting any, but if there were I would be asking you to ignore it.” (T.12/13/04 at 156-57).

During trial, after a lunch break, defense counsel brought to the trial court’s attention that the Gazette newspaper had, on page 25, an article in that day’s paper about the case. (T.12/15/04 at 98, 100). The article referred “to the fact that Michael Wilson [the co-defendant] pled guilty and the terms of his plea and, as of yet, that is not before the jury.” In addition, copies of the newspaper were available in the courthouse. (T.12/15/04 at 98). Defense counsel “defer[red] to Your Honor’s experience” as to how to phrase a question to the jurors. (T.12/15/04 at 100).

The trial judge called the jurors into the courtroom and said: “I do have one other issue I want to take up with you and that is this. First of all, have any of you, by any chance, seen press coverage or media coverage of this case?” (T.12/15/04 at 101). Only juror number 100 responded that he had “read today’s Gazette” and that he read the article about the case. (T.12/15/04 at 101-02). The court reminded the jurors that they were to ignore any media coverage, and then spoke with juror number 100 individually. (T.12/15/04 at 102, 104). Juror number 100 said that reading the article had not affected his ability to serve as a fair and impartial juror, because “[i]t didn’t give any additional information. I was just intrigued with the fact that it was not the

first time the case was tried." (T.12/15/04 at 105). The following colloquy then took place:

> THE COURT: And *have you discussed the article with any of the other jurors?*
>
> JUROR NO. 100: *No. No.* I mean, to be quite honest, I saw the article and it just didn't click in that we were prevented from seeing it, and *I mentioned it to two other people, but I didn't, they didn't read the article, honestly.*
>
> THE COURT: *And did you tell them anything about what was in the article when you mentioned it to two other people?*
>
> JUROR NO. 100: *No, I did not.*

(T.12/15/04 at 105) (emphasis added).

The trial court initially decided to excuse the juror, but the prosecutor added:

> Your Honor, could I just make one point? If the Court's primary concern is the potential that the information about Michael Wilson's plea improperly gets into the jury deliberation room, we have not made a decision, a final decision about that. We would ask that you hold this juror. He has not discussed it, maybe you admonish him again to make sure he doesn't say anything to any of the jurors, and if and when we do or don't put Michael Wilson on the stand, then you can make a final determination.

(T.12/15/04 at 107). The prosecutor pointed out that they were down to "only one alternate at this point" and to excuse the juror would be "risky."

(T.12/15/04 at 108).[7] The prosecutor reasoned that the information that the case was being retried hurt the State more than the defense, and that if Wilson testified, his guilty plea would be before the jury in any event. (T.12/15/04 at 108).

The trial judge then decided to "reserve on this issue until the end of the trial and see whether, has Michael Wilson testified or not and how many jurors I have at the end of the trial, just in case there is a problem." (T.12/15/04 at 109). The judge also stated, "I will admonish the jury they are not to discuss anything about the case, they are not to read any press coverage. . . ." (T.12/15/04 at 109). Finally, the court said, "He is still on the jury, but he may or may not be, actually, one of the jurors that deliberates." (T.12/15/04 at 109). Baby's attorney excepted to the court's ruling, but did not move for a mistrial. (E. 109).

After closing arguments, the trial judge did, in fact, excuse juror number 100. (E. 558). As juror number 100 stated that he had not shared the contents of the article with other members of the jury, and he did not engage in the deliberations that resulted in a verdict, Baby has failed to demonstrate that the trial judge clearly abused her discretion by waiting until after closing arguments to excuse the juror, and has failed to show that he was prejudiced by the court's ruling.

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[7] Snow was also in the forecast. (T.12/15/04 at 108).

Baby's reliance on *Wright v. State*, 131 Md. App. 243, *cert. denied*, 359 Md. 335 (2000), is misplaced. *See* Respondent's Brief at 63-64. There, two newspaper articles containing prejudicial information about similar prior convictions of the defendant were mistakenly sent back to the jury during its deliberations, and all twelve of the deliberating jurors read them. The Court of Special Appeals reversed, finding that the risk that the prejudicial information might have been used against the defendant by the deliberating jurors was too great. *Id.* at 270-71.

In this case, by contrast, the only juror to have read the newspaper article was dismissed prior to deliberations, thus eliminating any possibility that the deliberating jurors were consciously or subconsciously affected by the article. In addition, nothing in the article approached the degree of prejudice in *Wright*. Moreover, the only information from the article that juror number 100 remembered was that the case was being retried, and he explicitly told the trial court that he had not communicated the contents of the article to any other juror. While the prejudice in *Wright* stemmed from the fact that all the deliberating jurors gained extrajudicial knowledge that was prejudicial to Wright, the risk alleged here, that the knowledge of juror number 100 would infect the jury's verdict, where juror number 100 did not deliberate and he explicitly told the court that he had not shared the contents of the article with any other jurors, is nothing more than idle speculation.

Baby has failed to cite any case decided by this Court that supports reversal under the circumstances in this case. His reliance on cases from other jurisdictions are to no avail, *see* Respondent's Brief at 64-66, as none of the cases he cites is similar to the critical aspect of the situation at bar, *i.e.*, that the juror who read the news account was dismissed before deliberations began. On the contrary, where a juror or jurors who have read news accounts during trial are excused, the defendant's right to a fair trial has been adequately protected. *See*, *e.g.*, *State v. Adams*, 374 N.E.2d 137, 140-41 (Ohio) (mistrial not warranted where two jurors who read a news story were excused and replaced during trial, and they stated that they had not communicated the story to other jurors), *vacated on other grounds*, 439 U.S. 811 (1998); *cf. State v. Altrui*, 448 A.2d 837, 847-48 (Conn. 1982) (where juror who read newspaper article during trial stated that he had not discussed it with any jurors and he was excused the following day, court's error in communicating *ex parte* with juror was harmless).

Baby also contends that the trial court erred when it dismissed juror number 100 without first inquiring of him and the other jurors whether the "exclusive information" from the newspaper article had been revealed. (Respondent's Brief at 66). At trial, however, Baby neither moved for a mistrial after the trial court allowed juror number 100 to remain on the jury, nor did he request that the jurors be questioned before juror number 100 was

dismissed. Baby's failure to request such action by the trial court below waives this contention on appeal. *See Kanaras v. State*, 54 Md. App. 568, 573 (objecting party's failure to request relief in form of sanctions, bars appellate review of issue), *cert. denied*, 297 Md. 109 (1983); *cf. Klauenberg v. State*, 355 Md. 528, 545 (1999) (there is no basis for relief on appeal where appellant received the remedy he requested from the trial court).

Moreover, there is no reason to believe that juror number 100 could not be relied upon not to tell the other jurors what he learned from the article, as Baby also contends. *See* Respondent's Brief at 65. On the contrary, juror number 100 did not willfully disobey the court's preliminary instruction to ignore any press accounts of the case. He told the trial judge that, "to be quite honest, I saw the article and it just didn't click in that we were prevented from seeing it[.]" (E. 175). Accordingly, there is no reason on this record to doubt the sincerity of juror number 100. *Cf. Jones v. United States*, 527 U.S. 373, 394 (1999) (recognizing presumption that jurors will follow court admonitions to avoid media coverage regarding a case upon which they are sitting). In sum, Baby has failed to state grounds for a reversal.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the judgment of the Court of Special Appeals with regard to its rulings on the trial court's response to the jury's questions, and uphold the Court of Special Appeals' rulings with regard to the admission of expert testimony and the decision to remove a juror after closing arguments.

Respectfully submitted,

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PERTINENT PROVISIONS

Rule 5-702. Testimony by experts.

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

(2006 Rules)

STATE OF MARYLAND,	*	IN THE
Petitioner/Cross-Respondent	*	COURT OF APPEALS
v.	*	OF MARYLAND
MAOULOUD BABY,	*	September Term, 2007
Respondent/Cross-Petitioner	*	No. 14

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2007, three copies of the Reply Brief of Petitioner and Brief of Cross-Respondent were hand-delivered to Michael R. Malloy, Assistant Public Defender, Office of the Public Defender, Appellate Division, William Donald Schaefer Tower, 6 Saint Paul Centre, Suite 1302, Baltimore, Maryland 21202.

_____

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