Circuit Court for Allegany County
Case No. C-01-CR-22-000244

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 231

September Term, 2023

JUSTIN A. NIZER

v.

STATE OF MARYLAND

Nazarian,
Zic,
Robinson, Dennis M., Jr.
(Specially Assigned),

JJ.

Opinion by Robinson, J.

Filed: May 3, 2024

A jury sitting in the Circuit Court for Allegany County convicted the appellant, Justin Nizer ("Nizer"), of assault in the second degree. Nizer timely filed this appeal. He argues the circuit court erred by admitting into evidence portions of the redacted medical records that indicate Nizer assaulted his wife, B.R.[1] He also challenges the circuit court's admission of testimony from the forensic nurse examiner, Nurse Debbie Wolford, in which she testified that she was told that B.R. was "assaulted by her husband." Nizer contends it was not harmless error for this evidence to have been admitted. For the reasons explained below, we affirm the judgment of the circuit court.

BACKGROUND

During the early morning hours of October 30, 2021, a domestic altercation ensued between B.R. and Nizer in Allegany County, Maryland. At the time of the incident, B.R. and Nizer were married and resided together. On the night of the incident, B.R. received a phone call at some point in the evening and retreated to the bathroom to take the call. An argument soon arose after Nizer was awakened by the noise of the phone call. Nizer subsequently entered the bathroom and struck B.R. several times on her head and neck. B.R.'s daughter and Nizer's niece eventually broke up the altercation, at which point B.R. called the police. Officer Andrea Bennett of the Cumberland Police Department responded to the call for service.

[1] We will refer to the victim in this case by her initials in accordance with Maryland Rule 8-125.

When Officer Bennett arrived at the scene, Nizer was no longer present at the house, and no arrests were made. Officer Bennett briefly examined B.R. for injuries, but did not observe any visible injuries at the time. Officer Bennett offered medical treatment to B.R., which B.R. declined. B.R. sought medical treatment at the emergency room the next day at the University of Pittsburgh Medical Center in Western Maryland.

The State charged Nizer with assault in the first degree and assault in the second degree. Prior to trial, defense counsel filed a motion in limine to preclude the introduction of certain statements within B.R.'s medical records following the incident. After concluding jury selection on March 2, 2023, the circuit court heard arguments regarding the motion in limine. Defense counsel argued that the medical records contained information that was not "pathologically germane to either the diagnosis and/or the medical treatment" of B.R. Defense counsel further asserted the medical records contained conclusions by medical personnel that B.R. was assaulted, a conclusion which medical personnel were not "qualified" to make. Defense counsel proceeded to identify the exact statements the defense was seeking to be redacted. During defense counsel's arguments the circuit court noted:

> So (b) (4), statements for the purposes of medical diagnosis or treatment, statements made for the purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history or past and present systems [sic], pain or sensation, or the inception or general character of the cause or external sources thereof, in so far as reasonably pertinent to the treatment or diagnosis and contemplation on the treatment. That seems to me to be the rule that is in play here. I don't believe this is a business record exception, I don't believe that is what we are arguing about here. So, I would like you to point to me where you think the rule does not apply. If it is from the very first statement, I am telling you I don't agree

> with that, I think that a patient coming in and advising that she has been assaulted is germane to her course of treatment. She is not going to come in and say that my head has come into contact with an object. That's not going to help in the diagnosis and . . . [.]

After the circuit court heard arguments regarding the motion in limine, the circuit court granted, in part, and denied, in part, defense counsel's requested redactions. The court declined to redact the following statements, concluding that they were admissible pursuant to Maryland Rule 5-803(b)(4):

- Statement on page 10, under chief complaint section, "assault, cervical spine fracture" and under the history of present illness section, "[B.R.] is a 32 yo F who presents 2 days after reportedly being assaulted by her significant other, who she states struck her in the head and neck."
- Statement on page 13, under the chief complaint section it states, "assaulted by ex-husband, hit in head last night, vomiting." Furthermore, under the history of present illness section it states, "patient tells me that last night about 1:00 in the morning she was hit in the head several times by her ex-husband who still lives with her. . . she tells me that she did call the police. She was in the bathroom and he attacked her."
- Use of the word "assault" or "assaulted" in numerous sections throughout the medical records when describing the chief complaint.
- Statement on page 70 under the assessment section, "She reports that Friday evening around 8pm they were arguing[.]"

Nurse Wolford, who was qualified as an expert regarding forensic nurse examinations, testified at trial regarding her examination of B.R. During the trial, the State introduced the partially redacted medical records over defense counsel's renewed objection during Nurse Wolford's testimony. Nurse Wolford testified as to the purpose of the forensic nurse examination and stated that before meeting B.R. at the hospital "it was reported to me she was assaulted by her husband." Defense counsel objected, and the circuit court overruled the objection.

The jury found Nizer guilty of assault in the second degree and acquitted him of assault in the first degree. This appeal followed.

DISCUSSION

Nizer presents one question on appeal that we rephrase: Did the circuit court err by admitting into evidence the victim's medical records and expert testimony regarding the purpose of the victim's medical treatment?[2]

A. The Circuit Court Did Not Err When Admitting the Redacted Medical Records.

First, Nizer contends the circuit court erred in admitting the redacted medical records. Specifically, Nizer argues several statements within the records do not fall within the parameters of the hearsay exception of a statement made for the purposes of medical diagnosis or treatment under Md. Rule 5-803(b)(4) as the statements were "not pathologically germane" to B.R.'s diagnosis and/or treatment. Nizer also argues the

[2] Appellant subsequently filed an errata in which he clarified the question presented in his original brief. He changed the question presented to: "Did the circuit court err by permitting the State to present statements that were either inadmissible hearsay or unfairly prejudicial?"

record fails to establish that B.R. was aware of the medical purpose when she made the statements.

Pursuant to Maryland Rule 5-802, hearsay is inadmissible unless it falls within an exception. This Court has explained that:

> [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error.

Gordon v. State, 431 Md. 527, 538 (2013) (internal citations omitted). The underlying reason for which to exclude hearsay revolves around issues of reliability. Hearsay raises several concerns such as "[t]he declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener." *State v. Galicia*, 479 Md. 341, 354 (2022) (citing *Williamson v. United States*, 512 U.S. 594, 598 (1994)). Nonetheless, these concerns can often be minimized through testimony given under oath, the jury's ability to observe a witness's demeanor in assessing a witness's credibility, as well as an opponent's right to cross examine witnesses. *Id.*

One of the exceptions to hearsay is a statement made for the purposes of medical diagnosis under Maryland Rule 5-803(b)(4). Maryland Rule 5-803(b)(4) provides:

> Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain

> or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

Under the statements made for the purposes of medical treatment exception, statements within medical records generally must be "'pathologically germane' to the physical condition which caused the patient to go to the hospital in the first place." *Hall v. Univ. of Md. Med. Sys. Corp.,* 398 Md. 67, 92 (2007) (citing *Yellow Cab Co. v. Hicks*, 224 Md. 563, 570 (1961)). Statements relating to the "'facts helpful to an understanding of the medical or surgical aspects of the case, within the scope of the medical inquiry[,]'" are considered pathologically germane. *Hall*, 398 Md. at 92 (citing *State v. Garlick*, 313 Md. 209, 222 (1988)). For a statement to qualify as a statement made for the purposes of medical diagnosis or treatment, a foundation must be laid which describes the circumstances under which the statement arose as well as the "content" of the statement as it pertains to the symptoms, pain, or causes which are "reasonably pertinent to diagnosis or treatment[.]" *Curtis v. State*, 259 Md. App. 283, 300-01 (2023). Statements made for the purpose of medical diagnosis or treatment are generally considered reliable because "'patient's statements to his [or her] doctor are apt to be sincere when made with an awareness that the quality and success of the treatment may largely depend on the accuracy of the information provided[.]'" *Id.* at 300 (quoting *State v. Coates*, 405 Md. 131, 141-42 (2008)). Therefore, "only statements that are both taken and given in contemplation of medical treatment" qualify under this hearsay exception. *Webster v. State*, 151 Md. App. 527, 537 (2003).

Based on our review of the record, it is evident that statements within the medical records indicating that B.R. was assaulted, the nature of the assault, and her symptoms following the assault were all admissible as statements for purposes of medical treatment or diagnosis under Maryland Rule 5-803(b)(4). Prior to the admission of the medical records, B.R. testified that she reported to the hospital the following morning after the incident. She testified that she sought medical attention after suffering from disorientation, dizziness, and nausea mere hours after the incident. The medical records indicate that B.R.'s reason for seeking medical treatment was due to an assault. The records further reflect B.R.'s statement to care providers specifying that she was assaulted by her significant other when she was struck in the head and neck. Accordingly, the medical providers ordered diagnostic tests to determine the proper diagnosis and ultimately concluded B.R. suffered from a concussion.

As noted by the circuit court, B.R.'s statements in the medical records in which she indicates that she was assaulted arose after medical examiners asked B.R. "what happened" to make her seek medical treatment. Medical providers are unable to treat, much less diagnosis a patient if they are unable to discern what caused the patient to seek medical attention in the first place. The statements within the medical records in conjunction with B.R.'s testimony sufficiently demonstrate that B.R. sought medical treatment in response to actively suffering from several symptoms following the assault. That makes B.R.'s statements pathologically germane to her treatment.

Nizer also argues that B.R.'s identification of her "ex-husband"[3] as the person who assaulted her does not fall within a hearsay exception and seeks to distinguish this case from our recent decision in *Curtis v. State*, 259 Md. App. 283 (2023). In *Curtis*, after a thorough review of cases in which the identity of an alleged abuser was revealed during a statement given for the purposes of the medical diagnosis, this Court held that the "medical treatment exception may permit the identification of the abuser in cases of intimate partner violence." *Id*. at 302-05, 308-311. In that case, we concluded that the victim's statement to her emergency care physician that she was assaulted by her boyfriend qualified as a statement made for purposes of medical treatment or diagnosis under Md. Rule 5-803(b)(4) because the victim's statement was made in a health care setting within a few hours after the assault and her answer was in response to a medical provider who inquired "what happened." *Id.* at 290-91. In addition, the statement described the "external cause" of the victim's symptoms and was reasonably pertinent to the treatment of her injuries as a victim of intimate partner violence, "with all the

[3] Appellant's brief indicates that B.R. indicated that she was assaulted by her "ex-boyfriend." However, State's Exhibit 4 provides that:

> 32-year-old female presents the emergency department today complaining of head and neck pain as well as vomiting. The patient tells me that last night about 1:00 in the morning she was hit in the head several times by her ex-husband who still lives with her. Patient tells me that she vomited several times today. She tells me that she did call the police. She was in the bathroom and he attacked her. Patient complains of head and neck pain. She denies any treatment prior to arrival to the emergency department other than she thinks she may have taken some Tylenol last night. She denies any loss of consciousness. Denies any abdominal pain.

attendant psychological and emotional injuries which may derive therefrom." *Id.* at 311-12.

Similar to *Curtis*, B.R.'s identification of her "significant other" and "ex-husband" as the cause of the assault fell within the parameters of a statement made for the purposes of medical treatment as it sufficiently raised concerns of intimate partner violence. Intimate partner violence is defined as "abuse or aggression that occurs in a romantic relationship. *Fast Facts: Preventing Intimate Violence*, Ctr. for Disease Control and Prevention (last modified Oct. 11, 2022), (https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html. An intimate partner can refer to both past and current spouses and partners. *Id.*

As we observed in *Curtis*,

> [O]ther state appellate courts, in applying the medical treatment exception under their respective evidentiary rules, have recognized that ascertaining the identity of the perpetrator in cases of intimate partner violence can be 'relevant to the effort of the emergency room physician to treat the abuse as an underlying cause, rather than simply the injuries that were inflicted' due to the cumulative mental, physical, and emotional impact that be can be inflicted by a continuing pattern of abuse.

Curtis, 259 Md. App. at 308 (internal citations omitted). Although Nizer argues that B.R.'s statement that she was assaulted "by her ex-husband" in the medical records does not indicate that there was a need for "treatment pertaining to 'intimate partner violence,'" it is clear from the medical records and B.R.'s testimony that B.R.'s statements in the medical records indicating that she was

assaulted by her "ex-husband" qualify as statements made for the purposes of medical treatment. Similar to the victim in *Curtis*, B.R. reported to the hospital while suffering from symptoms she developed after the assault. Hospital personnel inquired as to the reason B.R. came to the hospital in order to provide a proper diagnosis. Nurse Wolford also testified that she asked B.R. "what happened" as she was "trying to assess what kind of trauma or injury that she had" in order to understand what kind of medical treatment that B.R. needed. When considering the need to approach the diagnosis of a patient from a holistic lens, identification of an alleged abuser can be pertinent to the medical diagnosis. As intimate partner violence can be at the hands of both current and former partners, we find no error in the circuit court's decision to admit the redacted medical records. It is, therefore, not necessary to address the issue of harmless error.

B. The Circuit Court Did Not Err in Admitting Statements That Nizer Contends Constitute Inadmissible Double Hearsay.

Next, Nizer argues the circuit court erred in admitting double hearsay as Nurse Wolford stated that "it was reported to me [that B.R.] was assaulted by her husband." Nizer also contends the identity of the declarant in the medical records is "sometimes ambiguous" such as when the chief complaint is listed as "assault" in the medical records.[4] In response, the State argues that it is clear that B.R. is the source of the statements in the medical records.

[4] Located at page 18-22 of the State's Exhibit 4.

As previously noted, hearsay is inadmissible unless it falls within an exception. *See* Md. Rule 5-802. However, there are often times when hearsay statements contain another layer of hearsay trapped within the later statement. This is often referred to as double hearsay. Yet when double hearsay exists, each hearsay statement must "fall within an exception to the hearsay rule" pursuant to Md. Rule 5-805. Here, Nizer contends several pages of the medical records admitted into evidence contained double hearsay. Nizer argues that the statements in the medical records constitute double hearsay because the declarant in the medical records is ambiguous. In short, Nizer suggests one is unable to decipher whether or not B.R. herself made the statements.[5] We are unpersuaded by this argument. Within the contested medical records, the chief complaint of "assaulted" is the crux of what brought B.R. into the hospital on that day. The narrative within the "history of present illness" section also aptly describes the circumstances which caused B.R. to seek medical care in the first place. The statements that B.R. was assaulted and the foundational medical information needed such as B.R.'s reason for seeking treatment were all pertinent to the diagnosis or treatment of B.R. Therefore, these statements would still fall under the hearsay exception of a statement made for the purposes of medical diagnosis or treatment.

[5] In particular, Nizer raises the issue of double hearsay on page 18 through 22 of State's Exhibit 4 in which the chief complaint is listed as "assaulted." In addition, on page 10 in which it states in the "history of present illness" section that: "[B.R.] is a 32 y o F who presents 2 days after reportedly being assaulted by her significant other, who struck her in the head and neck."

To the extent that it is unclear whether or not B.R. made these statements, these statements do nevertheless fall within the business record exception pursuant to Md. Rule 5-803(b)(6). Md. Rule 5-803(b)(6) provides,

> A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The statements in the medical records were made at or near the time upon which the diagnosis was rendered, the reports were all made based off of information transmitted by B.R., the records were made and kept in the course of "regularly conducted business," and it is the practice of the hospital to keep medical records. The court did not err in admitting the medical records.

Nizer further argues that Nurse Wolford's testimony contained double hearsay. Nurse Wolford testified on the stand as to what was reported to her about B.R. This is a classic example of hearsay. Nurse Wolford testified about what an out of court declarant had learned from speaking with B.R. about the incident. Although the statement made by B.R. to other medical personnel that she was assaulted falls within the parameters of a

statement made for the medical diagnosis exception, the "outer layer" of the statement in which other medical personnel spoke to Nurse Wolford regarding B.R.'s report of assault does not fall within a hearsay exception. The circuit court therefore erred in overruling the objection. Nevertheless, this error was harmless beyond a reasonable doubt.

On review, an appellate court may declare a harmless error exists "where, on an independent review of the record, we are 'able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Greenberg v. State*, 421 Md. 396, 414 (2011) (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008)). "In making that determination, we 'consider whether the evidence presented in error was cumulative evidence'" – *i.e.*, that which 'tends to prove the same point as other evidence presented during the trial[.]'" *Curtis*, 259 Md. App. at 312 (quoting *Dove v. State*, 415 Md. 727, 743-44 (2010)).

Here, the impact of Nurse Wolford's testimony that B.R. was assaulted by her husband was cumulative in relation to the other evidence presented at the trial. Notably, Nurse Wolford never identified Nizer by his name. Nizer's identity as B.R.'s husband had been previously parsed out in both B.R. and Detective Bennett's testimony. Furthermore, B.R. testified prior to Nurse Wolford in which B.R. testified that she was assaulted by Nizer after he attacked her in the bathroom. Additionally, the redacted medical records were also admitted prior to Nurse Wolford's statement in which there are several references to an assault by B.R.'s significant other, which as previously discussed fall under a statement for medical treatment exception.

In short, we are convinced that due to the cumulation of other evidence presented, Nurse Wolford's statement that it was reported to her that B.R. was assaulted by her husband did not contribute to the guilty verdict. We therefore find that any error was harmless and does not warrant reversal.

C. The Circuit Court Did Not Abuse Its Discretion in Admitting the Unredacted Medical Records.

Finally, Nizer contends the circuit court abused its discretion when it failed to redact references in the medical records that B.R. was assaulted. Nizer argues that the "issue of whether Mr. Nizer assaulted [B.R.] was solely within the province of the jury to decide[.]"

Under Md. Rule 5-403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, "[t]his inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003) (citing *Martin v. State*, 364 Md. 692, 705 (2001)). An abuse of discretion is found "where no reasonable person would take the view adopted by the trial court" or "when the court acts without reference to any guiding principles." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007) (cleaned up). An abuse of discretion "should only be found in the extraordinary, exceptional, or most egregious case." *Id.* at 419 (quoting *Wilson v. John Crane. Inc.*, 385 Md. 185, 199 (2005)).

Nizer argues the statements within the medical records which indicate B.R. was assaulted invaded "the province of the jury generally and unfairly suggested that hospital staff concluded that Mr. Nizer was, in fact the attacker[]" which thereby violated Md. Rule 5-403. As previously discussed, the circuit court did not err in admitting the redacted medical records as the statements within the medical records fell within the parameters of the hearsay exception of a statement made for the purposes of a medical diagnosis or treatment. Nizer now seeks to raise the argument of prejudice under the guise of Md. Rule 5-403.

This argument hinges upon this Court's holding that the circuit court abused its discretion in admitting the redacted medical records. We decline to do so. As noted by the circuit court, a "patient coming in and advising that she has been assaulted is germane to her course of treatment." The circuit court acted under sound guiding principles when admitting the redacted medical records. In our view, a reasonable person could and likely would, take the view adopted by the circuit court. Moreover, contrary to Nizer's assertion, nowhere in the medical records does it identify or specify Nizer by name. Any references in the medical records therefore do not unequivocally "conclude" nor suggest that Nizer assaulted B.R. We conclude the circuit court did not abuse its discretion in admitting the unredacted medical records.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.