Circuit Court for Kent County
Case No. C-14-CR-22-000030

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1551

September Term, 2022

DAVID VANPELT

v.

STATE OF MARYLAND

Leahy,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: November 13, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, David Vanpelt, was convicted in the Circuit Court for Kent County of second-degree rape, sex abuse of a minor, second-degree child abuse, second-degree assault, and fourth-degree sex offense. Appellant presents the following questions for our review, which we have rephrased for clarity:

> 1. Did the trial court err by permitting the State to admit hearsay and improper lay opinion from the victim's medical records and improper expert opinion regarding the veracity of appellant's explanation for the alleged victim's injuries.
> 2. Did the trial court err by imposing separate sentences for Second-Degree Child Abuse and Sexual Abuse of a Minor?

Because we shall find that the trial court committed error in admitting inadmissible statements from the victim's medical records, and that error was not harmless, we shall reverse.

I.

Appellant was indicted by the Grand Jury for Kent County of second-degree rape, sex abuse of a minor, first-degree child abuse, second-degree child abuse, second-degree assault, and fourth-degree sex offense. The trial court entered a judgment of acquittal for first-degree child abuse, and the jury found appellant guilty on all remaining counts. For sentencing purposes, the court merged the convictions for fourth-degree sex offense and second-degree assault into second-degree rape. The court sentenced appellant to a term of incarceration of fifteen years for second-degree rape, a term of incarceration of twenty-five years, all but fifteen suspended, for sex abuse of a minor, and a term of incarceration of

fifteen years, all but ten suspended, for second-degree child abuse, to be served concurrently, followed by five years probation.

On January 9, 2022, appellant brought his three-year-old daughter, A.V., to the University of Maryland, Shore Medical Center with a laceration to her vagina. Appellant reported that A.V. had put a magnet in her vagina while in the bath. He stated that she had told him about this while in the bath and that the laceration was the result of his attempt to remove the magnet from her body.

Emergency room staff were concerned about the veracity of appellant's statement based on several perceived inconsistencies in his recounting of the event to different medical personnel. They contacted Child Protective Services and ordered a forensic sexual exam for A.V. Appellant was interviewed by a state trooper and a social worker about the events. He stated that his daughter had told him about the object in her vagina, that he had removed it with some difficulty using his fingers, that he had noticed some bleeding, and that he had applied antibiotic ointment before putting her diaper on. He claimed that the next morning, he called the hospital, and he took his daughter to the Medical Center in the afternoon. The police searched appellant's home on January 10, 2022, and found a small plastic purple cylinder near the bathtub. Appellant said that this was the item A.V. had inserted into her vagina. They also found four bloodstained diapers.

Because of the severity of her injuries, A.V. was transferred to the University of Maryland Hospital in Baltimore for more a more thorough examination and treatment. Dr. Elizabeth Hines examined her. Dr. Hines spoke to A.V.'s initial healthcare providers and

considered appellant's version of events. Based on her examination, she concluded that the injuries were likely caused by sexual abuse.

Appellant now directs our attention to two pieces of evidence presented at trial. The first is the testimony of Dr. Hines. At trial, Dr. Hines was qualified as an expert in pediatric emergency medicine. She testified that the injuries to A.V. were quite severe. The laceration wound inside A.V.'s vagina punctured through, not only the top layer of skin in her vagina, but several layers of tissue and muscle until it reached her rectum. A.V. had injuries to her labia, hymen, posterior fourchette, and rectum. Dr. Hines testified that, after examining A.V., she considered whether appellant had a "plausible" story to explain these injuries. She was informed by A.V.'s doctor at Shore Medical that appellant claimed A.V. had received the injury from a toy magnet being placed in her vagina. Dr. Hines testified that her opinion that the injuries were caused by sexual assault remained unchanged. She testified as follows:

> "When you see injuries of the genitals of children that are this severe and that are this acute and include the labia, include the posterior fourchette, include the hymen, and then you add on to it the addition of the rectum, the concern is very high for sexual abuse. When you do not have a matching story of any trauma that would make sense for such severe violent trauma to cause the injury, the concern goes even higher for sexual abuse. So the trauma alone makes me very concerned for sexual abuse. And when you have no associated story that could explain it, it is my opinion that it's sexual abuse."

She clarified further on redirect examination, that part of the reason she belived that the injury was the result of sexual abuse was because appellant's story about how his daughter had received the injury was not "plausible."

The second piece of contested evidence is A.V.'s medical records from Shore Medical Center. Appellant's counsel made several objections to these records when the State offered them, resulting in some redactions. However, the court did not redact several of the objected to statements, and admitted the document into evidence as State's Exhibit 1a. Appellant contends that Exhibit 1a contains highly prejudicial inadmissible statements. Page 6 of Exhibit 1a contains a narrative description from Dr. Norbert Straub of his medical decision making and critical care which states as follows:

> "We will plan abdominal x-ray since there was a report of metallic objects in her vagina. Child protective services has been contacted. Her father is aware of this. I have concern that the time course that the father reported has changed several times. Second concern is the delay in presentation to the ER."

Page 7 and 11 of the medical records contain similar triage notes from nurse Jennifer Greb which state as follows:

> "Melissa RN, gives writer a nod and head tilt with her finger pointing towards door, so the patient's dad could not see. [W]riter takes this as something is up and we need to speak privately outside the room. Once outside the room writer is informed this is a possible sexual assault."

Page 11 contains an emergency department care timeline including input from nurse Melissa Blackiston in which Ms. Blackiston marks "yes" on a checklist to "Abuse Indicators: Patient appears neglected or abused in accordance with the clinical indicators of abuse or neglect." Finally, Page 13 contains a clinical note from nurse Sandra Prochaska stating "as instructed by MD, MD State Police and Dept. Social Services was called 410-758-1101 for suspected abuse. Dawn Young-Social services returned the call stating she will be in with the police to investigate."

The jury found appellant guilty of second-degree rape, sex abuse of a minor, second-degree child abuse, second-degree assault, and fourth-degree sex offense. The court sentenced appellant as described above. This timely appeal followed.

II.

Appellant argues that the State relied on inadmissible evidence during trial. He argues that the medical records from Shore Medical Center should have had the following sections redacted.

1. The statement by Doctor Norbert Straub: "I have concern that the time course that the father reported has changed several times. Second concern is the delay in presentation to the ER about 24 hours after the original call was placed to the ER." (Statement 1)
2. The statement by Doctor Norbert Straub: "Child Protective Services has been contacted. Her father is Aware of this." (Statement 2)
3. Statements of nurse Jennifer Greb relaying the statements of "Melissa, RN": "[W]riter takes this as something is up and we need to speak privately outside the room. Once outside the room writer is informed this is a possible sexual assault." (Statement 3)
4. Statements of nurse Melissa Blackiston that A.V. "appears neglected or abused in accordance with the clinical indicators of abuse or neglect." (Statement 4)
5. Statements of nurse Sandra Prochaska that "as instructed by MD, MD State Police and Dept. Social Services was called . . . for suspected abuse." (Statement 5)

Appellant argues that all of the above-mentioned statements contained hearsay that did not fit into any exception to the hearsay rule of exclusion. He argues that the statements do not fall under the exception for statements made for the purpose of medical diagnosis or treatment in Maryland Rule 5-803(b)(4) or the business records exception in Maryland Rule 5-803(b)(6) because they were not germane to A.V.'s medical condition or treatment. He maintains that the statement by Dr. Straub that he is concerned that "the time course

that the father reported has changed several times" is an improper lay opinion on the veracity of appellant's story, and that the statements describing various medical staff members' concerns about sexual abuse constituted improper opinions about the likelihood of sexual abuse by individuals not qualified as experts.

Appellant argues that the improper admission of the enumerated portions of the medical records was not harmless because the case turned on whether A.V.'s injuries were the result of abuse or appellant's attempts to remove a toy from her vagina. As a result, statements casting doubt on appellant's version of events, or bolstering the claim that A.V. was abused were critical and may have affected the outcome.

Appellant further argues that the opinion testimony of Dr. Hines was inappropriate. He argues that she should not have been permitted to testify that his story about how his daughter had been injured was not "plausible." He also argues that his conviction for second-degree child abuse should have been merged with his conviction for sexual abuse of a minor. Because we shall find that the court erred in admitting inadmissible statements in the medical records, we will not set out the arguments underlying the improper expert opinion claim or the sentencing claim.

The State presents several evidentiary arguments for the admissibility of the statements in the medical records. First, the statements were admissible, not to prove the truth of the matter asserted, but to explain why law enforcement went to the hospital and initiated an investigation. Second, the State argues that, even if the records were hearsay, hospital records are admissible generally under the business records exception, provided that the contested statements are pathologically germane. The statements were relevant to

the victim's medical history and germane to treatment because pediatric providers need a full history to determne the cause of an injury.

In the alternative, the State argues that, even if the trial court erred in admitting the records, any error was harmless. Insofar as the statements describe concerns about the veracity of appellant's claims, suspicion of sexual abuse, and the decision to call law enforcement, they were indistinguishable from testimony by witnesses at trial. Multiple witnesses testified that medical personnel were concerned about the veracity of appellant's story, suspected sexual abuse, and called law enforcement.

III.

We review the decision to admit evidence alleged to be hearsay *de novo*. *Brooks v. State*, 439 Md 698, 709 (2014). Hearsay is an out of court statement offered to prove the truth of the matter asserted. Rule 5-801. The State argues that these statements were not offered to prove the truth of the matter asserted, but to show, briefly, why law enforcement went to the hospital and initiated an investigation of appellant. This argument is persuasive as to statements 2 and 5, which briefly state that Child Protective Services have been called, explaining why Child Protective Services came to the hospital.

The Supreme Court of Maryland has held that such arguments fail where the allegedly non-hearsay statements explain police conduct but, nonetheless, directly implicate the defendant. *Morris v. State*, 418 Md. 194, 226 (2011). Statements 1, 3, and 4 relate medical personnel's concerns about the veracity of appellant's claims and their suspicions of sexual abuse. These directly implicate the defendant. They were not brief

explanations for the presence of Child Protective Services or law enforcement, but, rather statements that bear directly upon appellant's credibility and guilt. We hold that these statements were not mere background statements but were hearsay, offered for the truth that (a) appellant's version of events was inconsistent and (b) the child was showing medical indicators of sexual assault. Because, as we shall find below, they lacked the necessary foundation to fall within an exception to the hearsay rule, they were inadmissible.

Hearsay may be admissible where it falls within an exception to the rule of exclusion. Hospital records may be admitted as business records under Rule 5-803(b)(6). *Hall v. Univ. of Md. Med. Sys. Corp.*, 398 Md. 67, 86 (2007). Opinions contained within medical records which are "pathologically germane," *i.e.*, relevant to diagnosis or treatment, are admissible hearsay under that rule. *Reynolds v. State*, 98 Md. App. 348, 358 (1998). Similarly, "pathologically germaine" statements may be admitted as statements pertinent to medical diagnosis or treatment under Rule 5-803(b)(4). *State v. Coates*, 405 Md. 131, 144 (2008). "Pathologically germane statements" are not limited to physical descriptions of injuries or diagnoses of conditions. In abuse cases, statements regarding the identity of a potential abuser, and medical professionals' concerns that a patient may be being abused are pathologically germane. *Curtis v. State*, No. 455 (Md. App. Ct. Oct. 24, 2023).

For instance, this court recently held in *Curtis* that statements identifying a close family member as an abuser can be pathologically germane. *Id.* The Court reasoned that, in the hours directly after an assault, medical staff may reasonably need to know the identity of an abuser to effectively treat a patient and a patient is likely to give over that information

to assist in their treatment. *Id.* Accordingly the Court admitted the victim's statement asserting that "she was assaulted by her boyfriend multiple times." *Id.*; *see also In re Rachel T*, 77 Md. App. 20, 37 (1988) ("As we pointed out before, the identity of Rachel's abuser was essential to her effective treatment, and thus information recorded into the medical record by the social worker was 'pathologically germane'"); *Reynolds v. State*, 98 Md. App. at 356-57 (finding that statements in a patient's medical record including that the patient was "allegedly positive for sexual abuse," that the doctor "questions that patient may have been abused," and that the doctor was concerned about the behavior of the patient's father were not excluded under the rule against hearsay). In this case, the statements regarding the medical staff's concerns that appellant might not be correctly reporting the cause of A.V.'s injuries or that A.V. might have been abused fall into the same catagory.

However, neither Rule 5-803(b)(4) nor Rule 5-803(b)(6) provides carte blanche for the admission of unfounded scientific or medical conclusions simply by routing those conclusions through hearsay statements. Pathologically germane opinions in medical records are inadmissible if those opinions fail to meet the foundational requirements that apply to expert testimony. *Reynolds*, 98 Md. App. at 358. For an opinion to be admitted through a hospital record, it must appear from the record that the person who expressed the opinion is qualified to do so. *Marlow v. Cerino*, 19 Md. App. 619, 626 (1974). It must appear from the record that there was an adequate factual basis for the opinion. *Reynolds*, 98 Md. App. at 358. In short, an opinion admitted through a hospital record is held to the same standard as the opinion of a purported expert on the witness stand. *Id.* Therefore,

opinions by various uncalled healthcare providers that a patient may be the victim of abuse are inadmissible absent sufficient evidence regarding the providers' qualifications, methodology, and factual basis. *Id.* at 360.

Here, two of the hearsay declarants, Melissa Blackiston, and the unidentified "Melissa" who spoke to Jennifer Grieb were not called or qualified as expert witnesses.[1] No evidence was presented as to any "clinical indicators" they relied upon in their determination that A.V. had been sexually abused. It was unclear whether their determination was based on an evaluation of the injury or the simple fact of a vaginal injury to a three-year-old. Nonetheless, statements 3 and 4, which contain their opinions that A.V.'s symptoms were consistent with sexual abuse were admitted over appellant's objection. This was error. *Reynolds*, 98 Md. App. at 359-61.

We agree with appellant that the error was not harmless. Unless we are able to declare, beyond a reasonable doubt, that the error in no way influenced the verdict, the error cannot be deemed harmless. *Dorsey v. State*, 276 Md. 638, 659 (1976). Here, the case turned almost entirely on whether the jury credited appellant's statements that A.V. was injured when he attempted to remove a toy from her vagina or, instead, credited the opinions of medical professionals who testified that A.V.'s injuries were caused by sexual abuse. While the State presented three medical professionals, it qualified only one, Dr. Hines, as an expert and, therefore only Dr. Hines should have been permitted to testify as

[1] It is unclear from the record if the "Melissa" who spoke to Jennifer Grieb was Melissa Blackiston. Whether these "Melissas" were the same individual has no bearing on our holding in this matter.

to the cause of A.V.'s injuries. Piling on the opinions of additional medical professionals or the unknown "Melissa," who affirmatively asserted that the injury matched "clinical indicators" of sexual assault, was prejudicial error. *Reynolds*, 98 Md. App. at 361. We cannot say beyond a reasonable doubt that the error did not contribute to the verdict.

We decline to reach the issue of Dr. Hines' testimony or the sentencing issue because we find that the court erred in admitting the hospital records, and that such an error requires reversal.

JUDGMENTS OF THE CIRCUIT COURT FOR KENT COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY KENT COUNTY.