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HEARSAY AND ABUSE: WHERE PAST IS PRESENT

The Hon. Andrea M. Leahy and Jared A. McClain, Esq.*

Abuse takes on many forms. Mental abuse, unlike physical abuse, leaves no visible trace. And, unlike a piece of carved wood that lays bare the work of a knife's whittling, when the object of abuse is a human being, layers of shame, fear, and trauma often obscure the imprint of physical and mental abuse. Consequently, in many cases of abuse, proof is problematic.

Many criminal and civil actions involve people, either as parties or witnesses, who are suffering from some form of abuse, trauma, or both.¹ Indeed, incidences of domestic abuse² and human trafficking,³

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1. See Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 U. MD. L.J. RACE RELIGION GENDER & CLASS 239, 241, 245–46, 257 (2016); Ron Cassie, *Children of the Night: Sex Trafficking is Maryland's Dirty Open Secret.*, BALT. MAG., Mar. 2017, at 86, 88–89.

2. As of October 1, 2018, the Maryland Code defines abuse as:

- (1) "Abuse" means any of the following acts:
 - (i) an act that causes serious bodily harm;
 - (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm;
 - (iii) assault in any degree;
 - (iv) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
 - (v) false imprisonment;
 - (vi) stalking under § 3-802 of the Criminal Law Article; or
 - (vii) revenge porn under § 3-809 of the Criminal Law Article.
- (2) (i) If the person for whom relief is sought is a child, "abuse" may also include abuse of a child, as defined in Title 5, Subtitle 7 of this article.
- (ii) Nothing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child.

Family Law – Domestic Violence – Definition of Abuse, ch. 501, 2018 Md. Laws (West) (to be codified at MD. CODE ANN., FAM. LAW §5-501(b)).

for example, occur in Maryland at staggering rates.⁴ CBS Baltimore reported in 2017 that “[t]he Centers for Disease Control and Prevention estimates more than half of Maryland women will be impacted by sexual violence in their lifetime.”⁵

Human trafficking includes sex trafficking, forced labor, and domestic servitude.⁶ The Baltimore Sun reported in 2017 that “Maryland has become a ‘hot spot[.]’” for human trafficking, “a destination for traffickers using Interstate 95 to connect victims to Baltimore, Washington, Philadelphia and New York”⁷ The year prior, the Maryland Judicial Council formed the Joint Workgroup on Human Trafficking, chaired by the Honorable Barbara Waxman, which it tasked with “developing and implementing plans to educate judges, magistrates, appropriate judiciary staff, and justice partners on issues related to human trafficking.”⁸ Jessica Emerson, the

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3. A yearly report published by the U.S. Department of State, defines sex trafficking as follows: “When an adult engages in a commercial sex act, such as prostitution, as the result of force, threats of force, fraud, coercion or any combination of such means, that person is a victim of trafficking.” U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 17* (2017), <https://www.state.gov/documents/organization/271339.pdf>.
 4. See Devin Bartolotta, *New Numbers Show Maryland has High Rate of Domestic Violence*, CBS BALT. (Oct. 25, 2017, 7:23 PM), <http://baltimore.cbslocal.com/2017/10/25/domestic-violence/> (describing high rates of domestic abuse); Cassie, *supra* note 1, at 87–88 (describing high rates of human trafficking). Human trafficking is prohibited pursuant to MD. CODE ANN., CRIM. LAW § 11-303 (West 2018).
 5. Bartolotta, *supra* note 4. According to Maryland’s 2015 Uniform Crime Report, there were over 15,300 incidences of domestic violence in Maryland that year. MD. STATE POLICE, *CRIME IN MD.: 2015 UNIFORM CRIME REPORT 51* (2016), <http://mdsp.maryland.gov/Document%20Downloads/Crime%20in%20Maryland%202015%20Uniform%20Crime%20Report.pdf>.
 6. Emerson & Aminzadeh, *supra* note 1, at 243.
 7. Lorraine Mirabella, *University of Baltimore Law Students Help Trafficking Victims Escape Their Past*, BALT. SUN (July 8, 2017, 8:29 AM), <http://www.baltimoresun.com/business/bs-bz-human-trafficking-prevention-20170708-story.html>; see also Cassie, *supra* note 1, at 88 (“‘Maryland is a hot spot of trafficking. It’s that simple,’ says Maryland State Police Sgt. Deborah Flory, who oversees the agency’s two-person Child Recovery Unit. ‘That’s because of I-95, I-70, and BWI Airport, and the mix of wealth and poverty, which is one of the things that makes young women vulnerable.’”).
 8. MD. JUDICIAL COUNCIL, *MARYLAND JUDICIAL COUNCIL – JOINT WORKGROUP ON HUMAN TRAFFICKING* (2016), <https://www.courts.state.md.us/sites/default/files/import/judicialcouncil/pdfs/workgroups/humantrafficking.pdf>. The Joint Workgroup on Human Trafficking’s report on November 21, 2017, noted “that the group, Protected Innocence, conducts a comprehensive assessment on each state’s response to human trafficking and offers a corresponding grade. Maryland’s grade improved from an ‘F’ in 2011 to a ‘B’ in 2017.” MD. JUDICIAL COUNCIL, *MARYLAND JUDICIAL COUNCIL: MINUTES NOVEMBER 21, 2017*, at 2 (2017), <https://mdcourts.gov/sites/default/files/import/judicialcouncil/pdfs/minutes/20171121minutes.pdf>. In 2007, the U.S.

Director of the Human Trafficking Prevention Project at the University of Baltimore School of Law, explained in a recent article that human trafficking victims often get caught up in the criminal justice system, compounding the effects of their trauma.⁹ She explains:

The impact of having been trafficked on the psychological and physical well-being of victims combined with these limitations on access to basic needs leaves victims of trafficking convicted of criminal offenses vulnerable and without the stability they so desperately need as they work to heal from trauma and rebuild their lives.¹⁰

Cases involving victims of abuse present a special challenge for lawyers and judges alike. On one side are the constitutional rights of the accused, and on the other, are the often-tangled complexities surrounding an abuse victim's inconsistent testimony¹¹—or silence.¹²

Attorney's Office, the Attorney General of Maryland, and the State's Attorney for Baltimore City formed the Maryland Human Trafficking Task Force (MHTTF) "to serve as the lead investigative, prosecutorial, and victim services coordinating body for anti-human trafficking activity in the State of Maryland." *About the Task Force*, MD. HUMAN TRAFFICKING TASK FORCE, <http://www.mdhumantrafficking.org/mhttf/> (last visited Nov. 10, 2018). MHTTF's most recent victim identification report, from 2014, identified 396 survivors of human trafficking in Maryland (up from 217 in 2013). MD. HUMAN TRAFFICKING TASK FORCE, MARYLAND HUMAN TRAFFICKING VICTIM IDENTIFICATION AND SERVICES SURVEY: RESULTS FROM CALENDAR YEAR 2014, <http://www.mdhumantrafficking.org/s/2014-MD-Human-Trafficking-Scope-and-Services-Survey-FINAL-3123.jpg> (last visited Nov. 10, 2018).

9. Emerson & Aminzadeh, *supra* note 1, at 241; *see also* Mirabella, *supra* note 7 (explaining that "student lawyers at the University of Baltimore School of Law are working with the Maryland Volunteer Lawyers Service to expunge or vacate such convictions . . . to pave the way to employment for victims and end a cycle of control and abuse.").
10. Emerson & Aminzadeh, *supra* note 1, at 241.
11. As Judge Joseph Murphy explained in his treatise on evidence: "Disbelief of a witness does not ordinarily permit the factfinder to conclude that the opposite of what the witness testified to is true. . . . If the witness is not believed on that point, the jurors 'erase the blackboard.'" JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 409, at 167 (4th ed. 2010); *see also* State v. MacArthur, 664 A.2d 68, 69 (N.H. 1994) (holding that the trial court erred admitting as substantive evidence a pretrial, videotaped interview of the victim to rebut the victim's recantation at trial).
12. Consciousness of guilt can sometimes be inferred from nonassertive verbal conduct, but "[e]vidence of a person's silence is generally inadmissible because '[i]n most circumstances silence is so ambiguous that it is of little probative force.'" Grier v. State, 718 A.2d 211, 217 (Md. 1998) (second alteration in original) (quoting United States v. Hale, 422 U.S. 171, 176 (1975)); *see also* Weitzel v. State, 863 A.2d 999,

The rules of evidence act as the fulcrum. This Article examines recent applications of the law of evidence in Maryland—specifically the rules pertaining to hearsay—as courts balance the rights of the accused with a modern understanding of the effects of abuse and trauma.¹³

I. THE ROLE OF THE JUDGE

Our adversarial judicial system tasks the fact-finder—the jury in many instances—with evaluating the credibility of witnesses and determining which facts “preponderate.”¹⁴ To ensure that the fact-finder has the most reliable, or “best evidence,” available by which to carry out this function, the rules of evidence serve to cull what evidence a fact-finder may consider.¹⁵ A trial judge applies these rules in his or her role as the “evidentiary sentry.”¹⁶

A central part of this role is determining relevancy. Maryland Rule 5-401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

1002 (Md. 2004) (“We think the better view is that the evidence is too ambiguous to be probative when the ‘pre-arrest silence’ is in the presence of a police officer, and join the increasing number of jurisdictions that have so held.”). Alternatively, a victim’s silence may take the form of the victim not testifying at trial. In an opinion written by Judge Lynn Battaglia, the Court of Appeals of Maryland has held that, in such an instance, Maryland Rule 5-806 permits a defendant to impeach the credibility of the non-testifying hearsay declarant (the victim) through cross-examination of the State’s other witnesses. *Taylor v. State*, 963 A.2d 197, 213 (Md. 2009). The victim’s silence may also be relevant if the defendant attempts to coerce the victim to recant. For instance, in June 2018, Judge Michelle Hotten, on behalf of the Court of Appeals, held that the trial court did not abuse its discretion by admitting portions of a phone call in which the defendant sought to get his rape victim to recant but denying the defendant’s attempt to admit the remainder of the phone call under the doctrine of completeness. *Otto v. State*, 187 A.3d 47, 49 (Md. 2018).

13. “Traumatic disorders are not new; however, contemporary understanding of disorders and co-existing mental health conditions has recently become much more sophisticated and nuanced.” Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 646–47 (2016) (explaining the effects of trauma on juvenile offenders and the criminal justice system); see also Heather Forkey, *Medical Effects of Trauma: A Guide for Lawyers*, 34 CHILD L. PRAC. 97 *passim* (2015) (offering several insights and practice tips to help attorneys identify and respond to a client who may have suffered trauma).
14. T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 506 (1999) (quoting GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 1 (James Sedgwick ed., 7th ed. 1805)).
15. *Id.* (quoting GILBERT, *supra* note 14, at 1–2).
16. *Page v. State*, 114 A.3d 283 (Md. Ct. Spec. App. 2015).

would be without the evidence.”¹⁷ Evidence is relevant when it is both material and probative.¹⁸ “Evidence is material if it bears on a fact of consequence to an issue in the case[,]”¹⁹ whereas “[p]robative value relates to the strength of the connection between the evidence and the issue . . . ‘to establish the proposition that it is offered to prove.’”²⁰ Irrelevant evidence is inadmissible *per se*.²¹ But, under the rules of evidence, the converse does not apply in that not all relevant evidence is admissible.²² Under Maryland Rule 5-403, a trial court, exercising its discretion, may exclude relevant evidence if it believes that the probative value of the evidence 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.”²³

In the context of abuse and trauma, evidence of a party’s or witness’s psychological condition may be of particular import.²⁴ Such evidence can help explain to the jury why someone who has suffered abuse may act or seem a certain way, and thereby assist the jury in its role as the arbiter of credibility.²⁵ Expert witnesses and the

17. Md. R. 5-410.

18. *See Snyder v. State*, 762 A.2d 125, 131 (Md. 2000).

19. *Smith v. State*, 98 A.3d 444, 453 (Md. Ct. Spec. App. 2014) (quoting *Williams v. State*, 679 A.2d 1106, 1113 (Md. 1996)).

20. *Id.* (quoting *Williams*, 679 A.2d at 1113).

21. *See Perry v. Asphalt & Concrete Servs., Inc.*, 133 A.3d 1143, 1159 (Md. 2016) (citing Md. R. 5-402).

22. *See infra* note 23 and accompanying text.

23. Md. R. 5-403; *see also Boyd v. State*, 924 A.2d 1112, 1128 (Md. 2007) (holding that any relevance of prior bad acts “would be slight” and outweighed by the “possibility that the jury may have convicted Mr. Boyd because of his conduct on February 17 and 18, and July 11 and 18, 2004, rather than just his conduct on July 18th . . .”); *Graves v. State*, 637 A.2d 1197, 1203–04 (Md. 1994) (compiling cases in which relevant evidence was held to be excludable, and holding that the probative value of statement’s nonhearsay use “was greatly outweighed by its unfair prejudice to Graves because of the danger of misuse of the information by the jury.”).

24. *See, e.g., Wallace-Bey v. State*, 172 A.3d 1006 (Md. Ct. Spec. App. 2017) (citing *State v. Peterson*, 857 A.2d 1132, 1148–49 (Md. Ct. Sec. App. 2004)) (discussing the relevance of the psychological condition known as battered spouse syndrome as it pertains to the *mens rea* elements of self-defense cases).

25. “Often the events being recalled [by trauma survivors] are distant and difficult to express in words. We should expect such testimony to contain some inaccuracies without compromising the value of the testimony as a whole.” *State v. Kirby*, 382 P.3d 644, 650 (Utah 2016) (quoting LYNN ABRAMS, *ORAL HISTORY THEORY* 94 (2d ed. 2016)) (holding that a victim’s inconsistent testimony “could readily be interpreted by the jury as resulting from the trauma she experienced rather than as suggesting that she was not a credible witness”).

statements that a victim made in seeking a medical diagnosis may also help elucidate these points. But too much evidence explaining the witness's point of view may amount to impermissible bolstering or vouching, lack relevance to the issue at hand, be cumulative or confusing to the jury, or prejudice the accused in some other way. Other rulings that attempt to protect trauma victims from reliving their trauma in the courtroom may deprive the accused of their constitutional right to confront witnesses.²⁶ Even more challenging, is evidence of past behavior—either past assaults that a victim suffered or that an accused may have committed. Evidence of similar bad acts by an accused may be so prejudicial that, even with a limiting instruction, jurors may still determine that the accused has a propensity to commit abuse. Consider also the predicament that arises when a victim of abuse and trauma bonding²⁷ changes and recants the story about what happened when he or she was assaulted by the abuser. The victim's contemporaneous statement becomes more relevant, implicating Maryland Rules 5-404(b), 5-802.1, and 5-803(b).²⁸

Regardless of which evidentiary rule is at issue, Maryland Rule 5-102 requires courts to construe the rule in a way “to secure fairness in administration, eliminate unjustifiable expense and delay, and

26. The Confrontation Clause of the Sixth Amendment of the United States Constitution bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. See U.S. CONST. amend. VI. See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 120 (1999) (discussing the purview of the Sixth Amendment's Confrontation Clause on evidence admission); *Bruton v. United States*, 391 U.S. 123, 123–24, 126 (1968) (holding that the Confrontation Clause can bar the admission of some evidence under certain circumstances).

27. Earlier this year, the U.S. Court of Appeals for the Fifth Circuit considered whether a trial court erred in admitting an expert witness on trauma bonding. In a trial involving multiple counts of forced labor and harboring an illegal alien for profit, the government presented an expert witness on trauma bonding in *United States v. Murra*, 879 F.3d 669, 676–77 (5th Cir. 2018), *cert. denied*, 2018 WL 2290743 (U.S. Oct. 1, 2018) (No. 17-8924). Dr. Shannon Wolf, a professor of psychology and counseling at Dallas Baptist University, described trauma bonding as

[A] very powerful emotional connection between someone who is being abused and their abuser or perhaps a captive and a captor and it's mitigated by a series of traumatic events, traumatic situations. . . . [T]he abused person not only attaches to the abuser but to other people in the house, so they try to please this abuser, that's part of this relationship, and it's one of a very strong power differential where one person has a lot of power and the abused person has almost no power.

Id. The Fifth Circuit ultimately held that that the trial court's admission of Dr. Wolf's testimony did not affect the defendant's substantive rights. *Id.* at 679.

28. See MD. R. 5-404(b), 5-802.1, 5-803(b).

promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”²⁹

II. HEARSAY

A. *That’s Not Hearsay*

Sometimes lawyers and judges get caught up in trying to discern which exception to the rule against hearsay applies to a statement that is not hearsay in the first place.³⁰ Maryland Rule 5-801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”³¹ If a witness recounts a declaration that is not a “statement” or does not offer it “for the truth of the matter asserted[,]” courts will not exclude the testimony under the rule against hearsay.³² A “statement” is either “an oral or written

29. MD. R. 5-102.

30. *See generally infra* notes 31–68 and accompanying text. In August 2018, just prior to this article’s publication, the Court of Appeals of Maryland decided *Devincentz v. State*, 191 A.3d 373 (Md. 2018). The Court in *Devincentz* discussed the admissibility of testimony by a defendant’s son that an abuse victim was “yelling and screaming and saying things that she could do that would get [Devincentz] in trouble.” *Id.* at 396. The Court held that the statement’s “use for impeachment purposes under Md. Rule 5-616(b)(3) was not hearsay because Devincentz offered it for the fact that the victim *made* the statement—not for its truth.” *Id.* at 397. The victim’s alleged statement was significant, the Court reasoned, “because her implied threat was ‘evidence of animus that might show a motive for making false allegations’” *Id.* (citation omitted). Further, the Court observed that Devincentz’s son “did not detail the *contents* of [the victim’s] implied threats—only that she had made them.” *Id.* at 396-97. In dissent, Judge Shirley Watts reasoned that the statement *was* hearsay because it was offered “to prove the truth of the matter asserted—namely, that [the victim] could, in fact, do ‘things . . . that would get [Devincentz] in trouble.’” *Id.* at 402 (Watts, J., dissenting). According to Judge Watts, this statement was offered as direct proof of Devincentz’s theory of the case: “Simply put, Devincentz’s counsel did not assert that [the victim] fabricated her allegations of abuse because she disliked Devincentz or was biased against him. Devincentz’s counsel set forth a theory of the case that [the victim] falsely accused him of abuse because she wanted to leave the household, and introduced [Devincentz’s son’s] testimony to prove that point.” *Id.*

31. MD. R. 5-801(c).

32. *Stoddard v. State*, 887 A.2d 564 (Md. 2005); *see also* *Winston v. State*, 178 A.3d 643, 660 (Md. Ct. Spec. App. 2018) (holding that a voice exemplar of a witness in which the witness enunciated the defendant’s name as he said “Yeah, you know his name, Stanley Winston, mon” was “not hearsay, but rather circumstantial evidence of their familiarity with one another”), *cert. denied*, 183 A.3d 162 (Md. 2018); *Wallace-Bey v. State*, 172 A.3d 1006, 1027–28 (Md. Ct. Spec. App. 2017) (holding that a witness’s recounting of a decedent’s orders and commands were not factual assertions and, thus,

assertion” or “nonverbal conduct of a person, if it is intended by the person as an assertion.”³³ The Rules Committee has noted, however, that the definition of an “assertion” is “best left to development in the case law,” and that Maryland Rule 5-801 “also does not attempt to define when an assertion, such as a verbal act, is offered for something other than its truth.”³⁴ Looking to the decisional law, the Maryland Court of Appeals and Court of Special Appeals have offered greater clarity on what qualifies as an assertion.³⁵ Accordingly, “where the probative value of words, as offered, depends on the declarant having communicated a factual proposition, the words constitute an ‘assertion’ of that proposition.”³⁶

In *Wallace-Bey v. State*,³⁷ the Court of Special Appeals considered the interplay between the rule against hearsay and a claim of imperfect self-defense based on battered-spouse syndrome. Tania Wallace-Bey called 911 on October 24, 2007 and “reported that her boyfriend, Julius Whaley, had raped her and that she had shot him.”³⁸ “Wallace-Bey told paramedics that she had tried to kill herself by ingesting sleeping pills and alcohol.”³⁹ She was taken to the hospital for treatment where she gave detectives oral and written statements.⁴⁰

At Wallace-Bey’s trial, there was no dispute that she shot Whaley to death, so the focus was on the events that led to the shooting and her mental state under her claim of battered-spouse syndrome.⁴¹

not hearsay). The same precept applies to written evidence as well. *See, e.g.,* *Young v. State*, 174 A.3d 481, 489–90 (Md. Ct. Spec. App. 2017), (holding that valid prescriptions that provide the basis of a statutory defense to charges of possession with intent to distribute, “when properly authenticated, [are] not hearsay”), *cert. granted*, 457 Md. 662 (Md. Mar. 6, 2018); *Darling v. State*, 158 A.3d 1065, 1082–83 (Md. Ct. Spec. App. 2017) (holding that a phone number on a receipt linking appellant to the crime was not hearsay because “the State did not use the receipt to assert that appellant’s phone number was the number on the receipt”), *cert. denied*, 165 A.3d 462 (Md. 2017); *Harris v. Hous. Auth. of Balt. City*, 135 A.3d 866, 882, 883 n.15 (Md. Ct. Spec. App. 2016) (concluding that an affiant’s statement that he was unable to find employees who could remember the condition of a property during the specific timeframe at issue was not hearsay because it was asserted to show the trouble he had tracking down information, not to prove the truth of the employees’ statements).

33. MD. R. 5-801(a).

34. MD. R. 5-801 committee note.

35. *See Stoddard*, 887 A.2d at 577.

36. *Id.*

37. *Wallace-Bey*, 172 A.3d at 1006.

38. *Id.* at 1011.

39. *Id.*

40. *Id.* at 1011–12.

41. *Id.* at 1012.

During opening argument, the trial court sustained the State's "hearsay" objections related to proffered testimony about what Whaley *said* to Wallace-Bey during their relationship, but overruled the State's objections related to proffered testimony about what Whaley *did* to Wallace-Bey.⁴² Throughout her testimony about the abuse that she suffered, Wallace-Bey was interrupted by an objection whenever she started to say something like "he told me that[.]"⁴³ The court sustained the State's objection to Wallace-Bey testifying about text messages and emails that Whaley had sent her after she fled his apartment and granted the State's motion to strike her testimony that Whaley ordered her to "get naked" and "you are not leaving" the house tonight.⁴⁴ Additionally, despite the State including the same words in its case-in-chief, the trial court struck Wallace-Bey's testimony that, "after Whaley pulled her hair and removed her underwear, '[h]e said "you need to learn to take the dick."'"⁴⁵ On cross-examination, when the prosecutor asked Wallace-Bey why she did not leave the apartment on the occasion when Whaley had put her in a headlock, she was constrained to answer: "[B]ecause I'm barred from saying what he said, I will say that he said things that led me to believe that he would harm me if I moved."⁴⁶ Following her direct testimony, defense counsel moved for a mistrial, "contend[ing] that the court's restrictions on Wallace-Bey's testimony impaired her constitutional right to present evidence in her defense[.]" and "prevented her from presenting evidence of psychological abuse that was relevant to the issue of battered spouse syndrome."⁴⁷

Wallace-Bey challenged these decisions on appeal, arguing in main part that "the trial court[']s rulings] deprived the jury of critical information it needed to meaningfully consider" her self-defense

42. *Id.* At the outset of the defense's case, the State made a motion *in limine* to exclude as hearsay, any testimony by Wallace-Bey of any statements made to her by Whaley. *Id.* at 1015. Defense counsel argued that the statements made by Whaley to Wallace-Bey were not offered for the truth of the statements but rather, for their effect on Wallace-Bey—"to show how those statements affected her mental state and her decision-making process[.]" *Id.* (alteration in original). Without providing a rationale, the court granted the State's motion, and the clerk made an entry in the docket stating that the court granted motion "that any Statements of [the] Victim are Hearsay[.]" *Id.* at 1016 (alteration in original).

43. *Id.* at 1018–19.

44. *Id.* at 1019.

45. *Id.* (alteration in original).

46. *Id.* at 1020 (alteration in original).

47. *Id.* at 1019–20.

claims.⁴⁸ She insisted that she offered her testimony to show the effect that her boyfriend's comments had on her and how those comments "instilled in her a sense of fear and coercive control by Whaley."⁴⁹ Further, she contended his comments to her "w[ere] admissible as evidence of 'psychological abuse' in addition to the physical and sexual assaults [she suffered]."⁵⁰

Judge Kevin Arthur, writing for the Court, determined that the trial court "committed prejudicial error by requiring Wallace-Bey to present the evidence that the victim [Whaley] repeatedly abused her without mentioning any words that he actually said to her."⁵¹ Judge Arthur began by explaining that the categorical ruling, on the State's request, prohibiting Wallace-Bey from testifying to any words Whaley said to her "vastly exceeded the scope of the rule against hearsay."⁵² He continued:

Aside from identifying Whaley as the declarant, the State offered no details about any of the declarations that it sought to exclude. The State supplied no information for the court to evaluate whether any of the unspecified declarations were "assertion[s]" by Whaley and thus "statement[s]" within the meaning of Rule 5-801(a). The State insisted that Whaley's words would be "offered for the truth," but said nothing about what "truth" Whaley was asserting or what "truth" Wallace-Bey would be attempting to prove. The State did not come anywhere close to meeting its burden The court should have summarily denied the State's unfounded motion.⁵³

Reciting Judge Charlie Moylan's observation that lawyers seem to have "a Pavlovian reflex . . . to leap to their feet and yell, 'Hearsay!'" whenever a witness testifies "to words spoken by some other person on some other occasion,"⁵⁴ Judge Arthur announced the point that "a trial court should never exclude evidence as hearsay solely because a witness attempts to testify about something that someone allegedly said outside of the courtroom."⁵⁵ Citing Professor

48. *Id.* at 1022.

49. *Id.* at 1026.

50. *Id.*

51. *Id.* at 1011.

52. *Id.* at 1026–27.

53. *Id.* at 1027 (first and second alteration in original).

54. *Id.* (quoting *Holland v. State*, 713 A.2d 364, 369 (Md. Ct. Spec. App. 1998)).

55. *Id.*

McLain,⁵⁶ Judge Arthur noted that “[i]n general, orders and commands are not factual assertions.”⁵⁷ Focusing in on the State’s objections during Wallace-Bey’s testimony, the Court held:

To the extent that the two declarations “get naked” and “you are not leaving” were orders, they were not assertions. To the extent that those declarations included any assertions, Wallace-Bey did not offer that evidence to prove that what Whaley said was true. The words “get naked,” might conceivably be hearsay if offered to prove through implication that the target of the command was wearing clothes when the command was given. In the context of this case, however, Wallace-Bey offered that evidence to recount how Whaley demanded to have sex with her that night. Wallace-Bey testified that Whaley said “you are not leaving” in response to questions about what Whaley did that night to dissuade her from leaving. The probative value of the testimony did not depend on Whaley’s sincerity or accuracy. As defense counsel correctly argued, her testimony was probative to explain how Whaley’s words affected her.⁵⁸

The Court further held that the trial court erred in sustaining the State’s hearsay objection and striking Wallace-Bey’s testimony that Whaley told her she needs to “learn to take the dick” just before raping her on the morning of the killing:

Even if Whaley’s alleged remark were an assertion of some kind, defense counsel certainly was not offering that testimony to prove the “truth” of whatever vile message he was allegedly asserting. Defense counsel introduced that statement to show how Wallace-Bey understood that Whaley was going to rape her at that time. The decision to strike that testimony was particularly aberrant, because Wallace-Bey’s testimony about those words was important to evaluating her perception that Whaley would assault her again when she shot him minutes later.⁵⁹

56. 6A LYNN MCLAIN, MARYLAND EVIDENCE: STATE & FEDERAL § 801:4, at 188 (3d ed. 2013).

57. *Wallace-Bey*, 172 A.2d at 1027 (citing MCLAIN, *supra* note 56, at 188 n.4).

58. *Id.* at 1028.

59. *Id.*

The Court rejected the State's argument that Wallace-Bey's testimony should not be admissible because it was "unfair" that Whaley was dead and therefore, unavailable to rebut Wallace-Bey's testimony.⁶⁰ The Court explained that "[t]he Maryland Rules do not bar admission of nonhearsay" for this reason.⁶¹ The Court reasoned that "Wallace-Bey is competent to testify about things that she claims to have personally heard Whaley say to her for the purpose of explaining how those words affected her[.]" and that she may recount his exact words for that purpose if she remembers them.⁶² It is then up to the State to rebut her account of events through cross-examination and for the jury to ultimately decide what to believe.⁶³

Specifically with respect to a defendant who raises the defense of battered-spouse syndrome, the Court noted that words spoken by the victim-abuser "can be particularly probative."⁶⁴ "All three phases of the cycle of violence at the center of the syndrome may involve words in addition to actions: expressions of hostility during the tension-building phase; 'verbal aggression' during acute battering incidents; and apologies, requests for forgiveness, and promises to change in the contrition phase."⁶⁵ The Court found further support in the Maryland Code (1974, 2013 Repl. Vol.), Courts and Judicial Proceedings Article (CJP), § 10-916(b)(1), which permits a defendant who asserts the defense of battered-spouse syndrome "to introduce not only evidence of 'physical' abuse but also evidence of 'psychological abuse of the defendant' by the victim."⁶⁶ Because the issue of battered-spouse syndrome is available even when the abuse is, at times, only psychological, the Court reasoned that "verbal conduct may be evidence of psychological abuse[.]" and, therefore, "the words allegedly spoken by Whaley to Wallace-Bey were essential to explaining the nature of her psychological abuse."⁶⁷

Finally, the Court held that the trial court "duplicated its earlier error by continuing to rule that everything spoken by Whaley to Wallace-Bey was inadmissible hearsay" and excluding as "double

60. *Id.* at 1029.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (citing *State v. Smullen*, 844 A.2d 429, 441 (Md. 2004)).

66. *Id.* (quoting MD. CODE ANN., CTS. & JUD. PROC. § 10-916(b)(1) (West 2018)).

67. *Id.* (citing *State v. Peterson*, 857 A.2d 1132, 1135, 1150–52 (Md. Ct. Spec. App. 2004)).

hearsay” testimony by Dr. McGraw, the expert forensic psychologist.⁶⁸ We address the latter issue within this article.

B. Spontaneous Statements

Once a court establishes that a relevant, non-privileged out-of-court statement is being offered to prove the truth of the facts asserted, then of course, it must be excluded unless one or more exceptions to the rule against hearsay apply.⁶⁹ “The exceptions to the hearsay rule are derived from the principle that under certain circumstances, ‘the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be superfluous.’”⁷⁰

One such exception to the rule against hearsay that courts in Maryland recognize is for “excited utterance.”⁷¹ In the context of sexual assault and trauma, this exception is often considered in conjunction with another exception—the exception for prompt reports of sexual assault.⁷² For instance, in *Cooper v. State*, the Court of Appeals considered whether a trial court erred in admitting the testimony of a rape victim’s roommate and that of an investigating officer because the testimony included hearsay statements that the victim made to those witnesses.⁷³ The victim’s roommate testified, over the defense’s hearsay objection, that the victim “woke me out of my sleep” and “after I talked to her for a while because she was like crying and emotional, she told me she had been raped.”⁷⁴ The roommate’s testimony also related the victim’s description of how the rape occurred.⁷⁵ Similarly, the investigating officer testified that when he met the victim “approximately an hour” after the sexual assault occurred, “she was emotional and at times tearful.”⁷⁶ He then

68. *Id.* at 1030.

69. *See, e.g.*, Md. R. 5-101(d); Md. R. 5-402; Md. R. 5-801(c); Md. R. 5-802.

70. *State v. Coates*, 950 A.2d 114, 121 (Md. 2008) (brackets omitted) (quoting JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, § 1420, at 251 (James H. Chadbourne rev. ed., 1974)).

71. Md. R. 5-803(b)(2).

72. Md. R. 5-802.1(d). *See also* *Muhammad v. State*, 115 A.3d 742, 751 (Md. Ct. Spec. App. 2015) (holding that a witness’s testimony “exceeded the bounds of a prompt complaint of sexual assault” by impermissibly corroborating the victim’s narrative of events surrounding the assault).

73. *Cooper v. State*, 73 A.3d 1108, 1124 (Md. 2013).

74. *Id.* at 1125.

75. *Id.* at 1125–26.

76. *Id.* at 1126.

also related the victim's description of the rape.⁷⁷ In response to the defense's objections at trial, the State argued that the victim's statements were admissible as excited utterances and as "a prompt report of sexual assaultive behavior."⁷⁸

When the case reached the Court of Appeals, that Court concluded that it need not consider the applicability of the exception for "prompt reports" of sexual assault victims under Maryland Rule 5-802.1(d) because the hearsay statements at issue were admissible as excited utterances.⁷⁹ The Court explained that "when introducing a hearsay statement under the excited utterance exception, '[t]he proponent of a statement purporting to fall within the excited utterance exception must establish the foundation for admissibility, namely personal knowledge and spontaneity.'"⁸⁰ Analyzing whether the testimony at issue met these requirements for admissibility, the Court reasoned that "there is no question that Victim had personal knowledge about the details of her attack when she spoke to Roommate and [the officer]. She was the victim of the attack."⁸¹ The Court held that spontaneity, the second factor, was also met.⁸² For this factor, the Court looked to the totality of the circumstances and concluded that there were sufficient facts "to indicate that when Victim told Roommate and [the officer] respectively about her attack she was 'still emotionally engulfed by the situation,' such that her statements about her attack were 'excited utterances.'"⁸³ Of the "many factors" considered in the totality of the circumstances, "[p]robably the most important . . . is the time factor."⁸⁴ The Court emphasized that both witnesses testified that the victim was still very emotional when she recounted her rape, which had just occurred less than an hour beforehand.⁸⁵ It concluded that, under the circumstances,

it was not a legal error or an abuse of discretion for the trial judge to admit statements made by Victim as excited utterances when she had been sexually assaulted approximately one hour earlier, her demeanor was such that

77. *Id.* at 1126–27.

78. *Id.* at 1126.

79. *Id.* at 1124–25.

80. *Id.* at 1127 (alteration in original) (quoting *Parker v. State*, 778 A.2d 1096, 1104 (Md. 2001)).

81. *Id.*

82. *Id.*

83. *Id.* at 1127 (quoting *State v. Harrell*, 702 A.2d 723, 727 (Md. 1997)).

84. *Id.* at 1128 (quoting *Cassidy v. State*, 536 A.2d 666, 674 (Md. Ct. Spec. App. 1988)).

85. *Id.*

she was “tearful” and “emotional,” she was still wearing the same clothing she wore at the time of the attack, and she was distraught when speaking to a detective after having been brought to a hospital to be examined physically and questioned concerning the attack.⁸⁶

C. *State of Mind*

As Judge Arthur pointed out in *Wallace-Bey*, out-of-court statements made to an abuse victim may be probative, not to prove the truth of the matter asserted, but to explain how the words affect the victim’s state of mind.⁸⁷ For instance, in *Copeland v. State*, the Court of Special Appeals of Maryland considered whether the trial court erred in admitting a victim’s testimony of the threats that her boyfriend, the appellant, made to her and her family.⁸⁸ The State charged Copeland with kidnapping, second-degree assault, false imprisonment, and carrying a dangerous weapon following his arrest after he drove away from the scene of an almost-accident with his hand around the neck of his girlfriend, Ms. Nesmith, who was seated in the passenger seat.⁸⁹ According to Ms. Nesmith, Copeland pulled a knife on her and forced her to drive him to the house of a friend with whom he suspected her of having an affair.⁹⁰ After Ms. Nesmith nearly struck an oncoming vehicle, the driver of that vehicle observed her stop the car and fall out into the road; the other driver then saw Copeland grab and force her back into the car before Copeland drove off.⁹¹ Ms. Nesmith said that Copeland told her “you know what I’m going to do to you now[,]” as he continued to drive with his hand around her throat.⁹² Officer Browning, who was

86. *Id.* at 1128–29.

87. *See* *Wallace-Bey v. State*, 172 A.3d 1006, 1028 (Md. Ct. Spec. App. 2017).

88. *Copeland v. State*, 9 A.3d 155, 158 (Md. Ct. Spec. App. 2010). In some circumstances, out-of-court statements to prove circumstantial evidence of a declarant’s state of mind may be admissible as non-hearsay evidence. *See, e.g.*, *Holland v. State*, 713 A.2d 364, 370–71 (Md. Ct. Spec. App. 1998) (holding that testimony that alleged co-conspirator expressed an intent to go “down the strip to sell” to be admissible non-hearsay circumstantial evidence that the conspirators “were operating collectively and not individually”); *Kinser v. State*, 591 A.2d 894, 896 (Md. Ct. Spec. App. 1991) (citation omitted) (holding that evidence of a crowd’s words demonstrated appellant’s own state of mind because for a considerable period of time, he was in the crowd as an active participant).

89. *Copeland*, 9 A.3d at 156–57.

90. *Id.* at 157.

91. *Id.*

92. *Id.*

finally able to pull over Copeland and arrest him, testified that Ms. Nesmith was hesitant to cooperate with police initially, but after a few minutes, told him that she was afraid that Copeland would hurt her and her family if she cooperated.⁹³

A jury convicted Copeland of second-degree assault.⁹⁴ He appealed, arguing, among other things, that Officer Browning's testimony about "Ms. Nesmith's expression of fear that appellant would hurt her or her family constituted inadmissible hearsay," and did not fit into any hearsay exception listed in Maryland Rule 5-803.⁹⁵ The Court of Special Appeals disagreed, holding that Officer Browning's testimony was admissible under Rule 5-803(b)(3) as a statement of Ms. Nesmith's then-existing state of mind.⁹⁶ In so holding, the Court noted that, most frequently, the exception under Rule 5-803(b)(3) applies to prove intent to engage in future content, but that "[h]ere, the testimony was admissible to prove the witness's then existing state of mind, *i.e.*, fear, to prove the truth of the stated reason for the fear, *i.e.*, a threat by appellant."⁹⁷

D. *Business Records*

Especially in family law cases, courts are often presented with reports that are largely founded on hearsay.⁹⁸ In *Denningham v. Denningham*,⁹⁹ Judge Alan Wilner, writing for the Court of Special Appeals, described custody evaluation reports as consisting "largely of hearsay declarations often double- or triple-level hearsay as well as opinions of various social workers, medical or paramedical personnel, psychologists, teachers, and the like, which may or may not have a reasonable basis."¹⁰⁰ He pointed out that the statements contained in these reports "have no special indicia of reliability[.]" as the statements are not under oath and are often made by persons who have "overt or covert bias."¹⁰¹ Judge Wilner instructed that "[t]heir usefulness to the court is only as strong as their reliability, and that

93. *Id.* at 157–58.

94. *Id.* at 158.

95. *Id.*

96. *Id.*

97. *Id.* at 159.

98. *See, e.g.*, *Leary v. Leary*, 627 A.2d 30, 41 (Md. Ct. Spec. App. 1993), *abrogated on other grounds by* *Fox v. Wills*, 890 A.2d 726, 728–29, 734, 737 (Md. 2006).

99. *Denningham v. Denningham*, 431 A.2d 755 (Md. Ct. Spec. App. 1981).

100. *Id.* at 759.

101. *Id.*

requires that they be subject to challenge in essentially the same manner as any other critical evidence.”¹⁰²

Last year, in *In re: Adoption/Guardianship of T.A., Jr.*,¹⁰³ the Court of Special Appeals considered whether the business records exception¹⁰⁴ applied to an exhibit containing five reports that Court Medical Services created in preparation for a child in need of assistance (CINA) proceeding: (1) a bonding evaluation of the child and its adoptive parents, (2) a parental fitness evaluation of the biological mother, (3) a parental fitness evaluation of the biological father, (4) a fitness evaluation of the adoptive parents, and (5) a bonding evaluation of the biological parents and the child.¹⁰⁵ The biological father appealed the juvenile court’s decision to admit the exhibit into evidence, arguing that the reports contained inadmissible hearsay.¹⁰⁶ Judge Dan Friedman, writing for the Court, first observed that the exception “allows for the admission of a report (memoranda, record, or data), despite the report being hearsay, if it was created in the regular course of business by a person with knowledge of the event at or near the time of the event.”¹⁰⁷ The report must be of a type that is kept in the regular practice of that business.¹⁰⁸ The Court held that “[r]eports created by Court Medical Services for review in child access cases do not qualify for the business records exception.”¹⁰⁹ Judge Friedman reasoned as follows:

It is clear from *In re Adoption/Guardianship No. 95195062/CAD*,^[110] that Father is correct in each of his arguments. *First*, the reports contained in Exhibit 91 “had nothing to do with the ‘running’ of the Juvenile Court Medical Service.” *Second*, the reports contained in Exhibit 91 were the opinions of Dr. Zajdel and Ms. Harriel and, therefore are “qualitatively different” from the information typically contained in a business record. And *finally*, “as a matter of fundamental fairness,” Father should have been

102. *Id.*

103. *In re Adoption/Guardianship of T.A., Jr.*, 168 A.3d 1071 (Md. Ct. Spec. App. 2017).

104. In Maryland, Rule 5-803(b)(6) provides an exception for “[r]ecords of regularly conducted business activity.” MD. R. 5-803(b)(6).

105. *In re Adoption/Guardianship of T.A., Jr.*, 168 A.3d at 1076–77.

106. *Id.* at 1076.

107. *Id.* at 1077 (citing MD. R. 5-803(b)(6)).

108. *Id.* (quoting MD. R. 5-803(b)(6)).

109. *Id.* (citation omitted).

110. *In re Adoption/Guardianship No. 95195062*, 696 A.2d 1102 (Md. Ct. Spec. App. 1997).

allowed to cross-examine Dr. Zajdel and Ms. Harriel about the reports contained in Exhibit 91. As a result, the reports contained in Exhibit 91 do not qualify for the business records exception. Moreover, although the parties have conceded here that Exhibit 91 is hearsay, and although *In re Adoption/Guardianship No. 95195062/CAD* expressly held twenty years ago that such reports are inadmissible hearsay, we now repeat that Exhibit 91, and reports like them, do not meet the requirement of the business records exception.¹¹¹

As Judge Friedman noted, however, in certain proceedings the “relaxed rules”¹¹² of evidence under Maryland Rule 5-101(c) permit the court, “in the interest of justice,” to “decline to require strict application of the rules”¹¹³

E. Expert Testimony and Rules 5-802.1 and 5-803

The Court of Appeals of Maryland opined on the value of expert testimony to support a defense of battered-spouse syndrome in its 2017 decision in *Porter v. State*.¹¹⁴ “When a woman uses physical force to defend against her abuser, expert witness testimony explaining the effects of battered spouse syndrome can be crucial to a successful self-defense claim.”¹¹⁵ Judge Sally Adkins, writing for the majority, explained that expert witness testimony is important because it “offers an explanation of why the defendant, having been previously subjected to abuse, simply did not leave the home or take some other action against her abuser,”^{116,117} and “[i]t also helps

111. *In re Adoption/Guardianship of T.A., Jr.*, 168 A.3d at 1078 (footnote omitted) (citations omitted) (quoting *In re Adoption/Guardianship No. 95195062*, 696 A.2d at 1112).

112. *Id.* at 1078 n.4.

113. *Id.* (quoting MD. R. 5-101(c)). Maryland Rule 5-101(c) permits “the court, in the interest of justice,” to “decline to require strict applications of the rules” in certain circumstances, including: “[p]roceedings for revocation of probation,” “[d]isposition hearings . . . including permanency planning hearings,” and hearings to modify child custody or visitation conducted pursuant to Maryland Rule 11-116. MD. R. 5-101(c).

114. *Porter v. State*, 166 A.3d 1044 (Md. 2017).

115. *Id.* at 1054.

116. *Id.* (quoting *State v. Smullen*, 844 A.2d 429, 441 (Md. 2004)). In July 2018, the Court of Appeals reversed the conviction of a father charged with sexually abusing his daughter, holding that the State’s expert witness impermissibly endorsed the credibility of the victim’s out-of-court statements. See *Fallin v. State*, 188 A.3d 988, 990 (Md. 2018). The expert had opined that the victim showed no “signs of fabrication or coaching” and said that she had no concerns about fabrication in pretrial interviews with the alleged victim. *Id.* The Court reasoned that an expert may provide the jury with “expert information on some signs of fabrication or coaching

explain to the jury ‘why, though *apparently* the aggressor, the defendant was actually responding to a perceived aggression by the victim.’”¹¹⁸ Relying on the Court’s prior decision in *Smullen*, Judge Adkins reiterated that in an abusive relationship, “the victim becomes able to sense the escalation in the frequency and intensity of the violence and thus becomes more sensitive to the abuser’s behavior.”¹¹⁹ Therefore, she can recognize the severity of the threat with greater certainty, and “[s]he is able to ‘recognize a threat of imminent danger from conduct that would not appear imminently threatening to someone who had not been subjected to that repetitive cycle of violence.’”¹²⁰

Regarding evidence admissible under the battered-spouse syndrome statute, the Court noted: “[E]xpert testimony regarding the cycle of violence in an abusive relationship can explain to the jury how a woman might *actually* fear imminent danger during a break between violent episodes.”¹²¹ Returning to its prior decision in *Smullen*, the Court emphasized the importance of an expert witness in helping the jury understand the psychology of a battered spouse:

[E]xpert testimony regarding battered spouse syndrome helps the jury evaluate whether the defendant could have safely retreated by describing “why the defendant, having

they might look for,” so the jury could form its own judgment of the victim’s credibility. *Id.* at 1003. But, the Court concluded, the expert’s testimony in *Fallin* was more akin to an inadmissible polygraph exam determining indications of deception. *Id.* at 1005.

117. In 2016, the Court of Appeals of New York iterated its position on the admissibility of expert testimony to explain the behavior of trauma victims:

We have previously held that expert testimony on [Child Sexual Abuse Accommodation Syndrome] is admissible, like other psychological syndromes, because it helps to explain victim behavior that might be puzzling to the jury. The expert educates the jury on a scientifically-recognized “pattern of secrecy, helplessness, entrapment [and] accommodation” experienced by the child victim. This includes assisting the jury to understand “why a child may wait a long time before reporting the alleged abuse,” fail to report at all, and deny or recant claims of sexual assault.

People v. Nicholson, 48 N.E.3d 944, 954 (N.Y. 2016) (second alteration in original) (citations omitted) (holding that an expert was appropriate to assist the jury to understand why a child victim would wait ten years to come forward).

118. *Porter*, 166 A.3d at 1054 (quoting *Smullen*, 844 A.2d at 451).

119. *Id.* at 1054–55 (quoting *Smullen*, 844 A.2d at 441–42).

120. *Id.* at 1055 (quoting *Smullen*, 844 A.2d at 451).

121. *Id.* at 1059.

been previously subjected to abuse, simply did not leave the home or take some other action against her abuser.” Holding that Porter has not put forth evidence that she believed she was in “imminent or immediate danger” because she had time to pursue other options to avoid the abuse would contradict our explanation of battered spouse syndrome. We admit expert testimony as to battered spouse syndrome in part to thwart the assumption that if the relationship was truly abusive, the woman would have left or sought help from law enforcement.¹²²

The Court of Special Appeals in *Wallace-Bey*, discussed more fully above, also opined on an expert’s ability to testify about a defendant’s history of abuse.¹²³ Although the battered-spouse syndrome statute does not make this specific type of evidence admissible, the Court reasoned that “[e]vidence of that kind of abuse . . . could still be admissible under some other provision or theory of relevance.”¹²⁴ *Wallace-Bey*’s contention on appeal focused on a report by Dr. McGraw that “ma[de] it clear that Wallace-Bey’s exposure to traumatic experiences, including childhood sexual abuse, was a cornerstone of Dr. McGraw’s conclusion about how battered spouse syndrome affected Wallace-Bey’s actions during the shooting.”¹²⁵ In the report, “Dr. McGraw opined that Wallace-Bey’s history of abuse made her vulnerable to being in a relationship in which she ‘re-experienced the pattern of domestic violence she had been exposed to in childhood[,]’” and that “medical literature indicates that a history of being battered can have a ‘direct effect’ on a battered woman’s ‘state of mind and her appraisal of danger[.]’”¹²⁶ “Dr. McGraw added that persons with long histories of trauma respond to threats ‘in the context of the sum total of their total traumatic life experiences’ and that the ‘cumulative effect of violence’ can ‘severely alter[.]’ a person’s ‘ability to cope with a threat[.]’”¹²⁷

The Court concluded that Wallace-Bey had established the relevance of the past abuse she suffered by linking it “to the basis for Dr. McGraw’s expert opinion.”¹²⁸ Because her attorney did not

122. *Id.* at 1061 (citation omitted).

123. *See infra* notes 124–32 and accompanying text.

124. *Wallace-Bey v. State*, 172 A.3d 1006, 1033 (Md. Ct. Spec. App. 2017).

125. *Id.* at 1034.

126. *Id.* (second alteration in original).

127. *Id.* (alteration in original).

128. *Id.*

articulate this theory of relevancy to the trial court, however, the Court instructed as follows:

On remand, if Wallace-Bey offers evidence that she was abused by persons other than Whaley as the foundation for an expert opinion about how that abuse affected her psychological condition and mental state, and if defense counsel articulates the theory of relevance that she advanced in this appeal, then the trial court should admit the evidence for that purpose over the State's relevancy objection.¹²⁹

Recognizing that the trial court may still exclude relevant testimony, the Court then explained that the probative value of past-abuse evidence “largely depends on how important (or unimportant) those facts were in the expert’s ultimate evaluation.”¹³⁰ The Court instructed that the trial court should weigh probative value against the countervailing factors (unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence) “to decide in the first instance exactly how much testimony of prior abuse to admit.”¹³¹ The Court concluded, “evidence should be admitted to the extent that it is necessary for the jury to understand and to meaningfully evaluate the expert opinions.”¹³²

The *Wallace-Bey* Court also addressed the admissibility of statements alleged to be hearsay contained within an expert witness’s report.¹³³ Judge Arthur reasoned that even though Dr. McGraw’s testimony “involved two out-of-court declarants, with Dr. McGraw recounting Wallace-Bey’s report of what Whaley said, the excluded testimony did not contain hearsay within hearsay” because “[i]t included no hearsay from Whaley.”¹³⁴ He continued, “Wallace-Bey was not attempting to prove that Whaley spoke the truth when he allegedly called her an ‘[un]suitable mate’ or said that she was ‘tainted and flawed.’ Nor was she attempting to prove the truth of Whaley’s alleged claims that he was ‘divinely ordained’ and ‘the police of God.’”¹³⁵ Rather, “[t]he defense offered testimony about

129. *Id.* at 1034–35.

130. *Id.* at 1035.

131. *Id.*

132. *Id.*

133. *See infra* notes 134–39 and accompanying text.

134. *Wallace-Bey*, 172 A.3d at 1030.

135. *Id.* (alteration in original).

those comments for the appropriate purpose of illuminating Dr. McGraw's opinion about psychological abuse from Whaley that Wallace-Bey suffered."¹³⁶ Therefore, the "evidence 'would have provided the jury a much fuller picture' of the basis for Dr. McGraw's opinion[,] and the trial court's ruling made it easier for the State to promote the contrary conclusion of its own expert witness."¹³⁷ Because of the trial court's evidentiary rulings, "[t]he jury heard a muted version of the defense case instead of the version that Wallace-Bey had the right to present under Maryland law."¹³⁸ The Court concluded: "In a case where the verdict depended on the jury's assessment of Wallace-Bey's credibility and the relative weight to be assigned to the competing expert opinions, we cannot come anywhere close to saying that the erroneous hearsay rulings had no effect on the outcome."¹³⁹

F. Tender Years Exception

Maryland Rule 5-802 acknowledges that the legislature may provide statutory exceptions to the rule against hearsay.¹⁴⁰ Recently, in *In re: J.J.*, the Court of Appeals of Maryland considered the admissibility of an out-of-court statement of a nine-year-old under the "tender years exception" found at § 11-304 of the Criminal Procedure (CP) Article of the Maryland Code.¹⁴¹ The statute applies in criminal cases and juvenile court proceedings, including CINA proceedings.¹⁴²

In re: J.J. was a CINA proceeding.¹⁴³ Prior to the adjudicatory hearing in that case, the juvenile court conducted a separate admissibility hearing under CP § 11-304 after the county department of social services gave notice that it sought to introduce J.J.'s audio-recorded forensic interview conducted at the Peninsula Regional Medical Center in which J.J. described how she was sexually abused by her father.¹⁴⁴ Ms. Tiffany Gattis, a licensed clinical social worker, testified that she conducted the interview using a forensic interview method known as Rapport, Anatomy, Touch, Abuse, and Closure

136. *Id.*

137. *Id.* at 1032.

138. *Id.*

139. *Id.*

140. See Md. R. 5-802 (stating that hearsay is inadmissible except as "permitted by . . . statutes").

141. *In re J.J.*, 174 A.3d 372, 374-75 (Md. 2017), *cert. denied*, 456 U.S. 428 (2018).

142. See *id.* at 374.

143. See *id.* at 374-75.

144. *Id.* at 377.

(RATAC).¹⁴⁵ Ms. Gattis, who at the time had interviewed approximately 3500 children in her work at the Child Advocacy Center, gave detailed testimony about J.J.'s demeanor and the reasons why she believed the child's testimony was credible.¹⁴⁶ On cross-examination, she acknowledged that she did not discuss "truthfulness" with J.J. during the interview because it was not part of the RATAC protocol.¹⁴⁷

Under CP § 11-304(g)(1)-(2), the court is directed to examine the child victim when determining the particularized guarantees of trustworthiness¹⁴⁸ and admissibility of the child's statement unless "the court determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary."¹⁴⁹ After hearing the testimony offered by Ms. Gattis and listening to the recording, the juvenile court concluded that it would not examine J.J. as part of its determination, having decided that "the audio recording of the child makes an examination of the child victim unnecessary in this case."¹⁵⁰ The court explained further, "I don't think it would add to my ability to determine whether that statement made back [in August] in light of the questioning had particularized guarantees of trustworthiness. So I'm not going to interview the child."¹⁵¹

Next, the juvenile court addressed the admissibility of J.J.'s statement for the truth of the matter asserted if she did not testify at the adjudication hearing.¹⁵² Pursuant to CP § 11-304(d)(2)(ii), "a child victim's out-of-court statement is admissible when the child does not testify 'only if there is corroborative evidence that the alleged offender had the opportunity to commit the alleged abuse or neglect.'"¹⁵³ The juvenile court found that there was "corroborative evidence that Mr. J. had the opportunity to sexually abuse J.J., given his pre-hearing statement against interest to Ms. Gattis that he was alone with the children on the dates of the alleged abuse[.]"¹⁵⁴

145. *Id.*

146. *See id.* at 378.

147. *Id.* at 379.

148. A child's out-of-court statement is admissible to prove the matter asserted "only if the statement has particularized guarantees of trustworthiness." MD. CODE ANN., CRIM. PROC. § 11-304(e)(1) (West 2017).

149. *Id.* § 11-304(g)(1)(ii).

150. *In re J.J.*, 174 A.3d at 379.

151. *Id.* (alteration in original).

152. *Id.*

153. *Id.* (MD. CODE ANN., CRIM. PROC. § 11-304(d)(2)(ii) (West 2017)).

154. *Id.* at 380.

The juvenile court heard from all parties on the thirteen factors set forth in CP § 11–304 for determining the admissibility of J.J.’s out-of-court statement.¹⁵⁵ The court found, among other things, that the “child has great personal knowledge of the event[,]” and that “[t]here was some spontaneity in the answers. Most of them were directly responsive to questions.”¹⁵⁶ The court also found that “[t]he timing of the statement is very proximate to the most recent abuse which was the night before . . . [a]nd what she described would be beyond the child victim’s expected knowledge and experience except for, unfortunately, for this child victim, she is a prior victim of sex abuse.”¹⁵⁷ After reviewing and rendering findings under each factor, the juvenile court determined that the statement was admissible.¹⁵⁸

Before the Court of Appeals, the petitioners—J.J.’s parents—argued that the juvenile court erred in admitting the out-of-court statement for the truth of the matter asserted because the court failed to determine whether the child understood the distinction between

155. *Id.* The statute directs that in determining whether the statement at issue has “particularized guarantees of trustworthiness,” the juvenile court “shall consider, but is not limited to,” the following factors enumerated factors:

- (i) the child victim’s personal knowledge of the event;
- (ii) the certainty that the statement was made;
- (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;
- (iv) whether the statement was spontaneous or directly responsive to questions;
- (v) the timing of the statement;
- (vi) whether the child victim’s young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim’s expected knowledge and experience;
- (vii) the appropriateness of the terminology of the statement to the child victim’s age;
- (viii) the nature and duration of the abuse or neglect;
- (ix) the inner consistency and coherence of the statement;
- (x) whether the child victim was suffering pain or distress when making the statement;
- (xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim’s statement;
- (xii) whether the statement was suggested by the use of leading questions; and
- (xiii) the credibility of the person testifying about the statement.

MD. CODE ANN., CRIM. PROC. § 11-304(e) (West 2017).

156. *See In re J.J.*, 174 A.3d at 380.

157. *Id.*

158. *Id.* at 382.

truth and falsehood.¹⁵⁹ Chief Judge Mary Ellen Barbera, writing for the Court of Appeals, however, noted “that CP § 11–304 is silent on whether a juvenile court must make a truth-competency determination prior to ruling on the admissibility of a child’s out-of-court statement[.]” and determined that the legislative history confirmed that the General Assembly did not intend to impose such a requirement.¹⁶⁰ Moreover, Chief Judge Barbera explained:

[A] preliminary competency determination is irrelevant to a juvenile court’s admissibility determination. There has been no showing, nor do we conclude, that the statute’s existing thirteen-factor trustworthiness test would be enhanced by requiring examination of a non-testifying child’s competency. Rather, CP § 11–304 imposes multiple conditions that must be satisfied prior to a juvenile court’s determination that the statement is admissible: the court must make a finding as to whether (1) it is unnecessary to examine the child; (2) there is corroborative evidence that the alleged abuser had an opportunity to commit the abuse; and (3) the child’s statement contains “particularized guarantees of trustworthiness.”¹⁶¹

The Court also addressed the mother’s argument that the out-of-court statement did not possess particularized guarantees of trustworthiness for various reasons, including that it was not “consistently repeated” and cited *Idaho v. Wright*.¹⁶² The Court rejected the mother’s contention, pointing out that the decision in *Crawford v. Washington*¹⁶³ replaced *Wright* as the seminal case on confrontation.¹⁶⁴ According to the Court, *Wright* applied only in the criminal context and Maryland courts have held that the right to

159. *Id.* at 374–75.

160. *Id.* at 384–85.

161. *Id.* at 385.

162. *Id.* at 386 (citing *Idaho v. Wright*, 497 U.S. 805, 821–22 (1990)). In *Wright*, the Supreme Court held that hearsay statements of child victims lacked particularized guarantees of trustworthiness required for admission under the Confrontation Clause and that “consistent repetition” is a factor to consider in determining the reliability of such statements. See *Wright*, 497 U.S. at 821–22, 826–27.

163. *Crawford v. Washington*, 541 U.S. 36 (2004).

164. *In re J.J.*, 174 A.3d at 387 (citing *Wright*, 497 U.S. at 805; then citing *Crawford*, 541 U.S. at 36).

confrontation does not apply in CINA proceedings or civil proceedings generally.^{165, 166}

III. CONCLUSION

The cases discussed in this Article were selected to illustrate the challenges presented in cases involving victims and witnesses suffering from trauma and abuse.¹⁶⁷ The cases demonstrate that courts may rely on the rules of evidence and their common law antecedents, as well as the opinions of experts when necessary, to provide the fact-finder with the best evidence.¹⁶⁸ The more that the bench and the bar are cognizant of the manifestations of abuse and trauma, the more we can guarantee equitable outcomes for everyone participating in the legal system.¹⁶⁹

165. *Id.* at 387–88 (citations omitted).

166. *See also* Tyler v. State, 679 A.2d 1127, 1131 n.4 (Md. 1996) (“In a civil case, there is no need to protect the defendant’s right of confrontation.”); In re Colin R., 493 A.2d 1083, 1087–88 (Md. Ct. Spec. App. 1985) (“The instant case is a juvenile C.I.N.A. proceeding, not a criminal prosecution, and the right of confrontation . . . is not available to the parents of an alleged C.I.N.A.”).

167. *See supra* notes 11–13 and accompanying text.

168. *See supra* notes 24–25, 28, 114–18 and accompanying text.

169. *See supra* note 8 and accompanying text.