Circuit Court for Montgomery County
Case No. 131441C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2536

September Term, 2017

DARRELL THOMAS ALLEN

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: September 23, 2019

The State charged appellant Darrell T. Allen with one count of sexual abuse of a minor and six counts of third-degree sexual offense. Following a jury trial in the Circuit Court for Montgomery County, Allen was convicted of sexual abuse of a minor and of one count of third-degree sexual offense. The jury was unable to reach a verdict on four counts of third-degree sexual offense, and the court had granted a motion for judgment of acquittal on a fifth count.

Allen was sentenced to 25 years' imprisonment for sexual abuse of a minor and a concurrent term of 10 years for third-degree sexual offense, with all but 20 years suspended. He appeals, arguing that the trial court abused its discretion in permitting the prosecutor and a detective to read excerpts from a transcription of his video-recorded interview with the police rather than play the video itself and by permitting expert testimony that was inconsistent with a pre-trial disclosure. We shall reverse and remand for a new trial.

BACKGROUND

In early February 2017, 16-year-old C.[1] told her older sister that Allen, their mother's live-in boyfriend, had raped her. The criminal charges against Allen grew out of the investigation of C.'s allegations.

At Allen's trial, C. testified about a series of incidents in which Allen had inappropriate sexual contact with her. C. testified, first, that on two occasions, when she was 14, Allen put his fingers inside of her vagina, the second incident following the first

[1] Because of the sensitive nature of this case, we refer to C., the alleged victim of sexual abuse, by her initial.

by about two weeks. Second, C. testified that when she was getting ready to take a shower about a week or so later, Allen put his mouth on her vagina. Third, C. testified that, a week or two later, Allen pulled her pants down and had vaginal intercourse with her. Fourth, C. testified that some time later, when she was 15, Allen had vaginal intercourse with her after she had fallen to the floor when he tried to take her pants off.

The Montgomery County Police Department and Child Protective Services jointly referred C. for a pediatric sexual-abuse examination by Dr. Evelyn Shukat. Before trial, the State informed Allen that Dr. Shukat had found no evidence of injury or trauma, but that she would testify that the absence of those findings was not conclusive as to whether sexual abuse had actually occurred. Although Dr. Shukat's written report said that she had observed "thinning" of C.'s hymen, "without transection," the doctor testified at trial that she observed an "incomplete" or "partial" transection of the hymen. When questioned about the apparent discrepancy between her report and her trial testimony, the doctor explained that "thinning" denotes an incomplete or partial transection. In C.'s case, Dr. Shukat could not say whether the thinning resulted from an injury, but she testified (over objection) that thinning can be caused by "previous trauma," among other things.

Detective Courtney Maines testified that on February 15, 2017, after C.'s allegations had come to light, Allen voluntarily came to the police station for a recorded interview. Detective Maines explained to Allen that he was in a police facility, but was not under arrest, and that he was free to leave at any time through the closed, but unlocked, door. The detective also explained to Allen that he was free to answer or not to

answer any of the detectives' questions as he wished. Although Allen was at the police station for about seven hours, the interview consisted of two phases that lasted only about four and a half hours.

Over a defense objection, the court permitted the prosecutor and the detective to read portions of the 193-page transcript of the interview rather than play a video-recording of them. In the portions that the State chose to read, Allen's statements were in some tension with his principal defense that C. had falsely accused him of sexual assault: Allen did not admit the truth of the allegations against him, but he seemed to explore other possible explanations besides an outright denial. The parties sometimes refer to these comments as "nondenials."

For example, Allen said that on a number of occasions C. had "come onto him" – kissing him on the lips and the neck, massaging him, and lying down behind him. In addition, he speculated that something of a sexual nature might have happened once when he was extremely drunk, but that he had blacked out and could not remember what had occurred. He recounted one incident in which, after a bout of heavy drinking, he fell asleep in his work clothes, found his clothes on the floor when he awoke, and was told by C.'s mother that she had not removed his clothes.

Toward the end of the interview, the detectives asked Allen what he would tell C. if she were there with him. He responded, "That I'm sorry for whatever happened and you don't know what it's about." When asked to explain what he meant, Allen said: "Obviously, if that happened, that means she came onto me again, man. That's the only way I can figure me doing some shit like that."

On cross-examination of Detective Maines, defense counsel used the transcript of the interview to demonstrate that Allen had repeatedly and emphatically denied C.'s allegations and protested his innocence. Counsel also used the transcript to demonstrate that the detectives had lied to Allen about the evidence against him[2] and had engaged in other forms of psychological manipulation in an effort to induce him to confess. Defense counsel did not use the video, perhaps because it was more efficient simply to use the transcript.

On the following day, Allen took the stand in his own defense, and defense counsel expressed an intention to introduce the video of the interview during his testimony. The State objected on the ground that Allen's statements were hearsay and that they did not fall within any exception to the general rule barring hearsay. The court sustained the objection.[3]

During Allen's testimony, he stressed that, in the interview with the detectives, he had repeatedly denied the allegations ("[m]aybe 60 times"). He also stressed that the

[2] The detectives told Allen that they had found his DNA on C.'s panties. That statement was apparently false.

[3] Allen's statements, if admitted to prove the truth of matters asserted therein, would have been hearsay in his case. The court correctly rejected Allen's contention that his denials were admissible under the hearsay exception for prior consistent statements, because he made the denials after a motive to fabricate had arisen. Md. Rule 5-802.1(b); *see Thomas v. State*, 429 Md. 85, 101-02 (2012); *Holmes v. State*, 350 Md. 412, 424 (1998); *McCray v. State*, 122 Md. App. 598, 610 (1998). Allen did not argue that his statements were admissible under Md. Rule 5-106 (remainder of recorded statements) or the common law rule of verbal completeness. *See, e.g., Otto v. State*, 459 Md. 423, 448-52 (2018). Although Allen's prior statements were inadmissible in his case, they were nonetheless admissible against him in the State's case because they were the statements of a party-opponent. Md. Rule 5-803(a).

detectives had lied to him, manipulated his emotions, and attempted to persuade him that he had had sexual contact with C. while he was drunk. He explained that he had made some of the nondenials because he was tired and wanted the interview to end.

On redirect examination, defense counsel asked Allen if he wanted the jury to watch the video. The State objected, and the court sustained the objection and instructed the jury to disregard the question and answer (which was that Allen did want the jury to watch it). Despite the court's instruction, counsel asked Allen, moments later, why he wanted the jury to see the video. The State objected again, and the court sustained the objection. Moments later, at the conclusion of redirect, defense counsel, in front of the jury, asked for permission to play the video of the interview and to have Allen comment on it.

At the ensuing bench conference, the court recognized that counsel's tactics might have led the jury to conclude that the State, the court, or both had withheld important evidence (the video). Consequently, the court agreed to admit the video into evidence, to allow defense counsel to discuss the video in closing argument, and to allow the jury to play the entire video during its deliberations. When the court asked whether the defense objected to the recording being admitted into evidence, defense counsel responded, "No, it's my, that's my request."

A few witnesses later, however, the defense sought to re-call Allen, to show him portions of the video, and to have him explain his statements to the jury. The court denied the request.

During closing argument, the defense played parts of the video and discussed others. Both the defense and the State urged the jury to watch the video. The jurors requested and received equipment to view the video.[4]

The jurors deliberated over two days before they found Allen guilty of child abuse and third-degree sexual offense in one of the incidents in which he allegedly had sexual intercourse with C. The jurors were unable to reach a verdict on any of the other counts that were submitted to them.

Allen took this timely appeal.

QUESTIONS PRESENTED

Allen presents two questions for our review.

1. Whether the trial court erroneously permitted the State to introduce secondary evidence of Mr. Allen's video recorded interview with the police, where the evidence could have misled the jury about the meaning of Mr. Allen's statements, and where the court precluded Mr. Allen from explaining to the jury what his statements meant and did not allow the video to be played except by the jury during deliberations?

2. Did the trial court abuse its discretion when it allowed Dr. Shukat, the State's child abuse medical expert, to testify that [C.] had an abnormal physical finding which could have been caused by sexual abuse, where Dr. Shukat's opinion, disclosed pre-trial, was that [C.]'s physical examination showed a lack of physical findings which neither confirmed nor refuted her history of abuse?

[4] In the interview, the detectives offered Allen the opportunity to take a polygraph examination, he agreed, and the detectives later informed him that he had failed. The references to the polygraph examination would have been inadmissible (*see Patrick v. State*, 329 Md. 24, 30 (1992)), but it is unclear from the record whether the video was edited to prevent the jury from hearing them.

For the reasons set forth below, we conclude that Allen has not preserved his objection to Dr. Shukat's testimony, but that the court erred in permitting the prosecutor and a detective to read from the transcript of the recorded interview instead of requiring the State to play the recording. We shall reverse the conviction and remand for a new trial.

DISCUSSION

I. Video-Recording of Interview

The "best evidence rule," Md. Rule 5-1002, states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." In general, Rule 5-1002 dictates that, when a writing, recording, or photograph is "closely related to a controlling issue" (Md. Rule 5-1004(d)), a party must introduce the original (Md. Rule 5-1002) or a duplicate (Md. Rule 5-1003), unless the original has been lost or destroyed, is not reasonably obtainable, or is in the possession of a party-opponent who has refused to produce it. *See* Md. Rule 5-1004(a)-(c); *see also* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1104[B], at 547 (4th ed. 2010) (explaining that, under Rule 5-1002, if the contents of a writing, recording, or photograph "are at issue, unless the original [or a duplicate] is produced, the trial judge must exclude any other evidence of content").

There is no serious question that Rule 5-1002 applies in this case, because the State sought to prove the contents of a "recording" or "photograph" – specifically, the

video-recording of Allen's non-denials, including what he said, how he said it, and what he meant.[5]

Allen argues that the circuit court ran afoul of the best evidence rule by permitting the State to introduce "secondary evidence" of his statements in the interview with the detective. In particular, he argues that the court erred in permitting the prosecutor and the detective to "re-enact" portions of the interview by reading from the transcript when, in his view, it should have required the State to play the relevant excerpts from the video. Allen argues that the video itself was the best evidence of the significance of his statements, because a cold transcript could not capture his facial expressions, his pauses or hesitation, his tone of voice, or his gestures.

The State argues, first, that Allen did not adequately preserve this point for review. We are unpersuaded.

When a dispute first arose about whether the State could read the transcript rather than play the video, defense counsel insisted that if the State "is trying to play portions of the statement, it should do it by way of the recording we have." From counsel's comment, it was reasonably clear that, in her view, the State was required to play the recording (i.e., the video) rather than read the transcript. In our judgment, the objection was sufficient to preserve an argument under the best evidence rule, which specifically

[5] The video-recording is obviously a "recording[]" within the meaning of Rule 5-1001(a), because it consists of "words . . . set down by . . . magnetic or optical impulse." In addition, the video qualifies as a "photograph," because that term is defined to "include" "video tapes" and "motion pictures." Md. Rule 5-1001(b).

applies to proof of the contents of a recording or photograph. Md. Rule 5-1002. In fact, the court itself said, "I think I got the grasp of your objection."[6]

Turning to the merits, the Court of Appeals has assumed that the recording of a conversation is the best evidence of what was said in the recorded conversation. *McGuire v. State*, 200 Md. 601, 606 (1952); *see also Forrester v. State*, 224 Md. 337, 349 (1961); *State v. Cabral*, 159 Md. App. 354, 385 (2004) (assuming that a video-recording was the best evidence of what occurred in a traffic stop). Furthermore, under Fed. R. Evid. 1002, from which the Maryland rule is derived, federal courts have held that a video-recording is the best evidence of the contents of the recording. *See, e.g.*, *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (holding that a videotape was the best evidence of its own contents, but that government did not violate the best evidence rule in admitting a transcript, because the tape had been erased in ordinary course of business and not at the government's behest); *McBeth v. Nissan Motor Corp. U.S.A.*, 921

[6] It appears that the State may originally have planned to play the video, but decided at trial to take a different approach. At trial, the State first suggested that the detective would testify, from recollection, about what Allen had said during the interview, which would not implicate Rule 5-1002. *See, e.g.*, *Jackim v. Sam's East, Inc.*, 378 Fed. Appx. 446, 565-66 (6th Cir. 2010) (stating that "[t]he fact that a video recording may at times be in fact the 'best' evidence of what occurred does not render first-hand testimony of the event incompetent"); *see also Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 51 (1st Cir. 1999) (holding that Fed. R. Evid. 1002 did not require a witness to introduce a written loan application in order to prove that he had submitted the application, but that the witness could testify from personal knowledge that he had submitted it); *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994) (holding that Fed. R. Evid. 1002 did not prohibit a witness from testifying from personal knowledge about the contents of an insurer's underwriting guidelines). When Allen nonetheless objected to the detective's proposed testimony, the court learned that the State had the transcript of the interview. The court sustained Allen's objection, but told the State that it could read portions of the transcript.

F. Supp. 1473, 1480 (D.S.C. 1996) (holding that, where a party sought to disqualify a trial judge because of his comments at a seminar, the best evidence of the comments was a recording, not a transcript, because the recording would show that the comments were intended to be humorous and were regarded by the audience as humorous). Consequently, we conclude that the video-recording of Allen's interview was the best evidence of what occurred in the interview.

It is unsurprising that, where the contents of a recorded interview are at issue, the recording itself is the best evidence of what occurred in the interview. A transcript cannot capture the speaker's demeanor, or the tone of voice, gestures, and facial expressions that give context and significance to the words on the paper. In some instances, the speaker's words, if uttered sarcastically, derisively, or jokingly, might mean the exact opposite of what the transcript literally appears to say. In other instances, the speaker's pauses and hesitation might convey an element of skepticism, doubt, or uncertainty that the words on the page do not capture. In other instances, the speaker's words might be misunderstood if they were expressed as a question or challenge ("that's what I said?"), but transcribed as an acknowledgement or admission ("that's what I said").

The transcript in this case had other problems, beyond the problems common to all cold paper records. On a number of occasions, Allen's gestures were essential to a complete understanding of what he meant, such as when he said that C. would "put her hand *like that*," or that she would kiss him "on the neck *like that*," or that she would "do something *like this* and then she [would] try to take [his] arm," or that he "went *like this*"

before "she kissed [him] on the neck," or that she would "come behind [him] and then start[] doing *like this*." (Emphasis added.) On other occasions, the transcript reports that Allen's words were "unintelligible," though they may not have been unintelligible on the recording itself. Finally, the jurors in this case did not simply receive a cold transcript of portions of the interview: they heard a reading of a transcript of the interview being presented by persons whose interests were not aligned with Allen's.

The State argues that any error is harmless beyond a reasonable doubt, because the court eventually admitted the recording of the interview, Allen was able to play a segment of the recording in closing argument, and the jury evidently viewed at least some of the recording during its deliberations (as evidenced by the jurors' request for equipment on which to view it). The State's argument has some force, particularly in light of the dubious tactics that defense counsel successfully employed in forcing the court to admit the recording. In the circumstances of this case, however, we cannot conclude that the eventual admission of the recording completely cured the initial error in allowing the prosecutor and the detective to read the interview rather than play the video-recording of it.[7]

Once a defendant demonstrates error in a criminal case, reversal is required "'unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the

[7] The error in this case does not simply concern the order of proof. Because the recording was the best evidence of what occurred in the interview, the State would not have been permitted to read the interview even if the jury had already heard and seen the recording.

verdict[.]'" *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)); *accord Wallace-Bey v. State*, 234 Md. App. 501, 545 (2017). "'Harmless error review is the standard of review most favorable to a defendant short of an automatic reversal." *Porter v. State*, 455 Md. 220, 234 (2017) (quoting *Bellamy v. State*, 403 Md. 308, 333 (2008)); *accord Wallace-Bey v. State*, 234 Md. App. at 546. "[W]here credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error." *Devincentz v. State*, 460 Md. 518, 561 (2018) (quoting *Dionas v. State*, 436 Md. at 110); *accord Wallace-Bey v. State*, 234 Md. App. at 546.

In arguing that the error was not harmless, Allen observes the court disrupted the order of proof, to his detriment, by admitting the recording (at his request) only after the State had read portions of the transcript to the jury. He stresses that because the cold transcript (unlike the video) did not reveal how emotionally distraught he was during the interview, the jury might not have realized that he made the nondenials as part of a desperate effort to tell the detectives what he thought they wanted to hear. He argues (Brief at 25): "Despite the unlocked door and early assurances that he was free to go any time – a reasonable fact-finder who *saw* and *heard* the best evidence of Mr. Allen's statements could conclude that he believed his only way out was to offer [the] Detectives *some* explanation in the form of a 'nondenial' that they might accept." (Emphasis in original).

Although the jurors eventually had the opportunity to watch the recording, we do not know precisely what they actually saw (other than a brief excerpt that defense counsel

was allowed to play in closing). Moreover, we are not convinced that the opportunity to view the recording, if the jurors took advantage of it, would necessarily overcome the initial impression (or misimpression) that the jurors might have gotten from watching the prosecutor and the detective read the excerpts. In a case that turned almost exclusively on the credibility of the accuser and the credibility of the accused, therefore, we cannot say beyond a reasonable doubt that the error had no effect on the outcome of the trial. In this regard, we note that the jury deliberated for more than two full days (after just over three days of trial) and was unable to reach any verdict on most of the charges that were presented to it. When the question of harmless error is fairly debatable, as it is in this case, we must err on the side of reversal.[8]

In summary, we hold that, when the contents of a recording are closely related to a controlling issue in the case, as when the State sets out to prove what a criminal defendant said and meant during a recorded interview, Rule 5-1002 ordinarily requires the introduction of the recording itself. In those circumstances, therefore, a trial court, upon a timely objection, ordinarily should require the proponent of the evidence to introduce the relevant portions of the recording rather than read from a transcript of the

[8] Separately, Allen argues that the circuit court erred in prohibiting him from admitting the video in his case-in-chief. Allen, however, did not proffer which portions of the video he wished to introduce, which defeats our ability to review his argument. *See, e.g., Samie v. State*, 181 Md. App. 59, 73 (2008). Allen also argues that, when his counsel tried to re-call him after the video had been admitted, the court erred in prohibiting him from offering his "lay opinion" about the meaning of his allegedly ambiguous statements. Allen did not, however, proffer what opinions he proposed to offer, which again defeats our ability to review his argument. *See Sutton v. State*, 139 Md. App. 412, 452 (2001).

recording. Because the court erroneously permitted the State to employ a transcript in this case, and because we cannot say that the error was harmless beyond a reasonable doubt, we are required to reverse the convictions and to remand for a new trial.

II. Dr. Shukat's Report

Allen contends that the court permitted the State's expert, Dr. Shukat, to express opinions that she had not disclosed before trial. We consider this issue for the sole purpose of determining whether it affords an independent ground for reversal. We conclude that it does not, because it was not adequately preserved.

Before trial, the State informed Allen that "Dr. Shukat w[ould] testify that a lack of physical findings is an indeterminate finding with respect to whether sexual abuse actually occurred." In addition, the State provided Allen with a copy of Dr. Shukat's report, which said that C.'s "[h]ymen was estrogenized, with thinning, *without transection*, at the [6 o'clock] position." (Emphasis added.)

Allen moved in limine to preclude Dr. Shukat from testifying that she could not confirm or rule out the possibility of sexual abuse on the basis of the physical findings in her examination of C. He argued that Dr. Shukat's opinion was not helpful to the jury. *See* Md. Rule 5-702 (requiring a court to determine that expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue"). Allen did not contend that the court should prohibit Dr. Shukat from discussing the findings themselves.

In response to Allen's motion in limine, the State asserted that Dr. Shukat would testify, in accordance with medical literature, that the absence of hymenal injuries is not

inconsistent with a report that a young woman had forcible vaginal intercourse. The trial court permitted Dr. Shukat to offer the challenged testimony.

Although Dr. Shukat's report had documented the "thinning" of the hymen "*without transection*," she testified on direct examination that C. had an "*incomplete transection*" of her hymen. (Emphasis added.) Dr. Shukat went on to explain that "one focal part" of the hymen was "[th]inned out, was almost completely cut in half."

Allen objected to that testimony. He also objected to Dr. Shukat's subsequent testimony that the findings were "inconclusive for trauma"; that she could neither confirm nor rule out the possibility of sexual abuse; that the inconclusive findings were not unusual given that six months had passed between the last report of sexual abuse and the examination; that vaginal penetration does not always yield findings of trauma; and that injuries will heal over time, leading to normal findings.

On cross-examination, defense counsel questioned Dr. Shukat about the apparent tension between her report, which referred to thinning "without transection," and her testimony at trial, in which she said she observed an "incomplete transection."

> Q: Dr. Shukat, you just testified that you observed in this case an incomplete transection of the hymen?
>
> A: Or thinning, it's the same description.
>
> Q: Okay well, because in your report, I just want to make sure that you're testifying consistently with your report. In your report did you say that [the] hymen had no transection?
>
> A: Without complete transection.
>
> Q: Okay. So it had a partial transection?

A: Yes.

Q: Which you did not indicate in your report.

A: I dictated thinning at the 6 o'clock position.

Q. Okay. Okay. So, the exam was within normal limits, correct?

A. Her physical examination was within normal limits but with respect to her external genital examination there was a finding as the report indicates of thinning of the hymen at the 6 o'clock position.

* * *

Q. Okay. So, [C.] had no injuries, correct?

A. I don't know what the thinning was from so I can't say that was an injury or not. I cannot comment on that.

On redirect examination, Dr. Shukat testified, over objection, that the incomplete transection could have been the result of healing from previous trauma or that it could have been a congenital condition (a "congenital variant" in the doctor's words).

On appeal, Allen argues that the trial court erred in permitting Dr. Shukat to offer a "previously undisclosed opinion" that she observed "an abnormal physical finding" and that the "undisclosed finding could have been caused by sexual abuse." The State responds that Allen failed to preserve what is, in essence, a complaint of a discovery violation, because he did not assert that ground as a basis for excluding the doctor's testimony in the circuit court. Allen counters that he made a general objection, which ordinarily will suffice to preserve any ground to exclude evidence.

In the circumstances of this case, Allen's general objection did not do enough to preserve the issue of whether the State violated its discovery obligations in its disclosure of Dr. Shukat's opinions.

"[A] contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence." *Boyd v. State*, 399 Md. 457, 476 (2007); *accord Bazzle v. State*, 426 Md. 541, 560-61 (2012). "Under Rules 2-517, 4-323, 5-103(a)(1), and [the Court of Appeals'] opinions, the only exceptions to the principle that a general objection is sufficient are where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence[.]" *Boyd v. State*, 399 Md. at 476 (quotation marks omitted); *accord Bazzle v. State*, 426 Md. at 561. In this case, a rule – specifically, Md. Rule 4-263, concerning discovery in criminal cases – implicitly requires that a ground be stated before the court can be expected to act.

Rule 4-263(n) says:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Under Rule 4-263(n), a court may not award discovery sanctions until it finds that a failure of discovery has occurred. The appellate courts conduct a de novo review of whether a discovery violation occurred. *See Cole v. State*, 378 Md. 42, 56 (2003). But

"the remedy is, 'in the first instance, within the sound discretion of the trial judge.'" *Id.* (quoting *Williams v. State*, 364 Md. 160, 178 (2001)).

It follows that, if the party seeking the discretionary sanction of exclusion under Rule 4-263(n) does not provide the court with enough information to make a finding about whether a discovery violation occurred, and if the court never exercises its discretion to determine the appropriate remedy, then the appellate court has nothing to review. Here, Allen did not complain that the State had violated its discovery obligations. Therefore, the circuit court had no opportunity to rule on whether a violation had occurred. The alleged violation is not before us.

In short, to discharge his burden of showing that the State had violated its discovery obligations (and to assist the trial court in determining the appropriate remedy), Allen needed to give the court some factual context beyond a general objection to Dr. Shukat's trial testimony. *Cf. Addison v. State*, 188 Md. App. 165, 181 (2009) (holding that a general objection was insufficient to preserve the right to a *Frye-Reed* hearing, which would involve evidence about whether an expert's opinion was generally accepted as reliable within her scientific field); *Ashford v. State*, 147 Md. App. 1, 65-66 (2002) (holding that a general objection was insufficient to preserve an objection based on the privilege for confidential communications between spouses during a marriage); *Ball v. Martin*, 108 Md. App. 435, 457-58 (1996) (holding that a general objection was insufficient to preserve a challenge to gender discrimination in jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny). At the very least, Allen needed to show Dr. Shukat's written report to the court and explain why the report did

not disclose the opinions that she had offered at trial. Yet, Allen did not bring the report to the court's attention. In fact, the report was not even part of the record on appeal until the State moved to correct the record to include it. We cannot fault the circuit court for permitting Dr. Shukat to offer a "previously undisclosed opinion" when the court had no apparent reason to suspect that her opinion had not previously been disclosed.[9]

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. MONTGOMERY COUNTY TO PAY ALL COSTS.

[9] The State goes on to argue that, even if Allen had preserved his objection to the alleged discovery violation, and even if Dr. Shukat's testimony was inconsistent with the pretrial disclosures, the exclusion of her testimony would not have been the appropriate remedy under Rule 4-263(d)(8). We shall not consider that argument, because the question of the appropriate remedy, if any, lies, in the first instance, in the discretion of the trial court. We do not decide the remedy for a discovery violation; we review the discretionary decisions that trial courts make once they have found a discovery violation.