Circuit Court for Montgomery County
Case No. 138472C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 639

September Term, 2022

ELMER ROBERTO CASTILLO

v.

STATE OF MARYLAND

Kehoe,**
Berger,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: March 7, 2024

** Kehoe, Christopher B., J., now retired, participated in the hearing of this case while an active member of this Court. After being recalled pursuant to the Constitution, Article IV, section 3A, he also participated in the decision and the preparation of this opinion.

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

A Montgomery County jury convicted appellant Elmer Roberto Castillo of one count of sexual abuse of a minor, two counts of second-degree rape, and five counts of committing a third-degree sexual offense. The court sentenced Castillo to a total of 41 years of incarceration. He appealed.

Because the circuit court permitted the State's witnesses to comment favorably on the alleged victim's credibility despite the well-established rule that "[t]estimony from a witness relating to the credibility of another witness is to be rejected as a matter of law[,]"[1] we shall reverse the convictions and remand for a new trial.

BACKGROUND

In May of 2021, a grand jury returned an eight-count indictment against Castillo. The indictment alleged that Castillo sexually abused "N.," who is sometimes referred to as his stepdaughter.[2] The abuse was alleged to have occurred in a continuing course of conduct between January 2018 and February 2021, when N. was between four and seven years old.

Trial

A five-day jury trial was held in April of 2022. The only evidence supporting the charges of sexual abuse consisted of N.'s trial testimony and statements that N. made to two child-abuse investigators and a medical doctor.

[1] *Bohnert v. State*, 312 Md. 266, 278 (1988).

[2] N. is a randomly selected letter. It may or may not be the first letter of the child's name.

N.'s second grade teacher testified that, in February of 2021, N., who was then seven years old, asked if she could stay and talk to her after school, which was being conducted remotely because of the COVID-19 pandemic. The teacher testified that, in their one-on-one online session, N. spontaneously said that she was "afraid of her stepfather when he was drunk." N. also said that her mother "threatened to send [N.] in a box back to Honduras by herself." The teacher, who is a mandatory reporter of child abuse,[3] reported N.'s statements to Child Protective Services ("CPS").

Within the same week, N. told her teacher about incidents of physical abuse. According to the teacher, N. stated that her stepfather "held her up by her neck and choked her and then dropped her" and that he had also choked her mother. N. also told the teacher that her stepfather held her "with her head inside of his armpit" and that she "had to bite him and scratch him" to get away. The teacher relayed these statements to CPS.

A. N.'s Pretrial Statements

On February 16, 2021, Katherine Allen, a CPS investigator, was assigned to investigate the allegations of physical abuse. On February 17, 2021, she made an unannounced visit to N.'s home and interviewed her. Three people were present in the home: N.; N.'s mother, "Ms. R."; and an infant, whose parents are Ms. R. and Castillo.

[3] Maryland Code (1984, 2019 Repl. Vol., 2023 Supp.), § 5-704(a) of the Family Law Article provides: "Notwithstanding any other provision of law, including any law on privileged communications, each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State who has reason to believe that a child has been subjected to abuse or neglect: (1) shall notify the local department or the appropriate law enforcement agency[.]"

Ms. R., who did not speak English, went into another room while Ms. Allen interviewed N.

Ms. Allen testified that N. did not respond when asked if she was safe and whether anybody had ever hurt her. She told N. that she had received a report that someone had hurt N., and N. responded, "no." She asked N. if anyone had ever touched her in a way that she did not like or that made her feel unsafe. According to Ms. Allen, N. said that her stepfather had touched her. Ms. Allen asked N. to show her how her stepfather had touched her. Ms. Allen testified that N. put her hand on her breasts and vagina and said that her stepfather had "rubbed" her there. N. also told Ms. Allen that her stepfather had "squeezed" her "butt." N. said that she did not tell her mother that her stepfather was touching her.

Ms. Allen brought the interview to a conclusion without asking any more questions about the allegations of sexual abuse. She testified that she had not been trained as a sexual-abuse investigator and that she had been instructed that once "we receive information that seems credible and—that we are to stop the interview and turn it over to a sex abuse—the sex abuse team." The court denied a motion to strike that testimony. In addition, the court allowed Ms. Allen to testify, over objection, that nothing in the interview led her to believe that N. had been "coached."

On February 18, 2021, Ms. Allen called Ms. R., with the assistance of an interpreter, to establish a safety plan for N. The plan required N. and Ms. R. to stay with friends until a sexual-abuse investigator could interview N. Until that time, Castillo was to have no contact with N. According to Ms. Allen, Ms. R. "became very tearful" and

"said she wasn't happy about" the plan. Ms. R. agreed to follow the safety plan, but said that it would be hard, because she was financially dependent on Castillo for food.

On February 23, 2021, Ms. R. brought N. to The Tree House Child Advocacy Center, where N. was interviewed by Sara Kulow-Malave, a forensic interviewer. Ms. Kulow-Malave described N.'s demeanor as "somewhat guarded." The interview, which was conducted outside of Ms. R.'s presence, was recorded. A video-recording of the interview was played for the jury.

During the interview, N. acknowledged that parts of her body are "private." She identified her private parts as those that she uses to "do number one" and to "do number two." N. said "no" when she was asked whether anyone had ever "done something" to her private parts. When Ms. Kulow-Malave asked N. to tell her about her stepfather, N. replied, "Well, I never saw him[.]" The following exchange, which is reproduced without alteration, followed:

> [Ms. Kulow-Malave]: You've never seen him?
>
> [N.]: I still don't know who is it because, or the names, but he didn't ever because, and but he pays our rent.
>
> [Ms. Kulow-Malave]: Uh-huh.
>
> [N.]: He helps us, he brings the cans of milk to my mom. He leaves, I never play with him, I never do nothing with him.
>
> [Ms. Kulow-Malave]: Oh, okay.
>
> [N.]: And I'm always asleep or in the playroom playing, or sleeping, I get tired.
>
> [Ms. Kulow-Malave]: Yeah, so [he] comes and he pays the rent and he brings the cans of formula.

> [N.]: And he brings food, but I never see him. That I never saw my sister's dad, but I think he's my stepdad, not that's mine, my sister's dad.

Ms. Kulow-Malave asked N. whether she ever talked to anyone about her stepfather. She responded, "No. I never saw him, like never, never." Ms. Kulow-Malave then asked, "What would make somebody worry about your stepfather doing stuff with you?" N. said, "I don't know, because he never came close to me, and I never see him." A little later in the interview, Ms. Kulow-Malave asked N. if her stepfather ever spent the night at her house. N. answered: "No. Well sometimes he goes to bed, to my mom and asks for help and to spend the night, but sometimes to the playroom, or sleeping, and take a long time, he takes the time to fix the milk and that."

N. said that her stepfather "never" choked her or her mother, and she denied that she told someone that he did. N. also denied that her mother had talked to her about what she was and was not allowed to say at the interview.

On March 16, 2021, Evelyn Shukat, M.D., saw N. because of a referral from CPS. Dr. Shukat, who testified for the State as an expert in the field of pediatrics and child sexual abuse, related what occurred during the evaluation:

> I asked [N.] if anybody had ever touched her in a way that she didn't like, and she responded immediately that both in her old and new homes, her stepfather had pulled down her pants, rubbed her vagina, and digitally penetrated her, which caused pain, and she said it made her pee feel hot and it hurt to pee, that she told him to stop and that she did not like it and sometimes she would throw his cell phone on the floor to distract him.
>
> Also, she stated to me that on one occasion he grabbed her hand and his pants were pulled down and he put her hand directly on his penis, which she later characterized to me as wet and hard, using her words,

> and she didn't like that, so she bit his arm. She also stated that he would rub her chest or her breast area under her clothes directly . . . on her skin.

A little later, Dr. Shukat added: "[N.] told me that she told her mother about the fingers going inside of her and the penile contact both in the old house and in the new house, but she said her mother didn't believe her." According to Dr. Shukat, N. said that her mother told her not to talk about her stepfather.

On cross-examination, defense counsel asked Dr. Shukat: "You are not here to testify as to whether or not the things [N.] said happened actually happened, correct?" Dr. Shukat responded:

> I'm here to tell you the results of what my patient said in a meaningful manner and report that. . . . I don't investigate, I don't go to the house or anything like that. But [N.'s] comments and statements were consistent with child abuse.

The court overruled defense counsel's objection, stating that he was objecting to "[his] own question."

On redirect examination, the State asked Dr. Shukat whether there were any factors that would cause her to be concerned about whether "a child might be fabricating something." As part of the lengthy statement that she delivered after being asked that question, Dr. Shukat volunteered that "in [her] opinion [N.'s] history of child abuse was credible."[4] The court denied a motion for mistrial.

[4] Here is the full exchange:

> Q. When you are examining children, are there any sort of factors you look at to see that would cause you concern as to whether or not a child might be fabricating something?

Immediately after N. disclosed sexual abuse to Dr. Shukat during the medical evaluation, Ms. Kulow-Malave conducted a second forensic interview with N. Like Ms. Allen, Ms. Kulow-Malave testified, over objection, that nothing in the second interview led her to believe that N. had been "coached."

> [Defense Counsel]: Objection.
>
> The Court: Overruled.
>
> [Dr. Shukat]: If a child is inconsistent in their statements, that leads me to be a little bit concerned. I start off each medical visit with a kid telling them they can ask me anything they want and I will tell them the truth and I ask them if they would do the same thing with me and we sort of fist bump together in the beginning. So, we establish that there's an open and honest environment between us. If the child's inconsistent about any details or anything like this, in this case, [N.] not only—
>
> [Defense Counsel]: Objection, this is not responsive.
>
> The Court: Overruled.
>
> [Dr. Shukat]: Not only told me about her abuse, she associated how her body felt when she was abused, that she experienced pain which is a very common and consistent characteristic of vaginal trauma. It hurt, she said it hurt when she had to urinate. Again, a consistent symptom associated with a narrative of having been sexually abused.
>
> So, *in my opinion her history of child abuse was credible—*
>
> [Defense Counsel]: Objection.
>
> The Court: Overruled.
>
> [Dr. Shukat]: —because she sustained it with somatic, with body feelings that were consistent beyond the knowledge of a seven-year-old.

(Emphasis added.)

A video-recording of the second interview was admitted into evidence and played for the jury. In the second interview with Ms. Kulow-Malave, N. said that Castillo put his finger in her "front body part," and "wiggle[d] it around." N. described her "front body part" as the part that she uses to "do the pee thing." N. stated that what Castillo did hurt and that it made her feel angry. N. said that Castillo also "pressed" his hand against her "cheek butt" and on her "tee part," which, Ms. Kulow-Malave explained, meant her breasts. N. told Ms. Kulow-Malave that on one occasion Castillo "grabbed" her hand and put it directly on his "front body part," which she described as the part of the body that he uses to "do number one."

N. explained that she did not say anything about the abuse in the first interview because "it felt strange." Ms. Kulow-Malave asked N.: "[W]hat do you think would happen if your mom finds out that you told us about your stepdad touching you?" N. responded, "Getting in trouble. . . . Because she said to me not to mention that."

B. N.'s Trial Testimony

N. was nine years old and in third grade at the time of trial. She testified that, when she was in second grade, she lived in an apartment and shared a bedroom with others, including her mother and her half-sister, who was born in December of that year. N. had her own bed, and her mother slept in another bed. The baby slept in a crib. A person named Oscar slept in a separate bed in the corner of the room.

When the prosecutor asked if there was anybody else in the same bedroom, N. said "yes,' but would not say the person's name. The prosecutor gave N. a piece of paper and asked her to write down the name of everyone who was in the same bedroom. N. wrote:

"my mom, me, my sister, oscer [sic][,] elmer[.]" N. said that her mother sometimes slept with another person in her bed. The prosecutor asked N. to draw an arrow next to the name of the person who sometimes slept with her mother. N. drew an arrow next to "elmer."

N. said that her mother did not work and that someone else, whose name was on the list, bought food and other things for the baby. The prosecutor asked N. to draw a line under the name of the person who bought things for the baby. N. drew multiple lines under "elmer[,]" whom she identified as the baby's father. She drew a partial line under "oscer" and explained that "I half lined him [because] he like maybe once buyed [sic] something for [the baby.]"

N. testified that "elmer" had touched her in a way that she did not like, but she did not want to say what part of her body he had touched. The prosecutor gave N. line drawings of the front and back of an unclothed female figure and a pen and asked her to mark the area where he touched her. N. circled the breasts, vagina, and buttocks. The testimony that followed, if believed, would establish that, on more than one occasion, Castillo touched N.'s breasts, vagina, and buttocks with his hands and digitally penetrated her vagina.

N. testified that "elmer" also made her touch him in a way that she did not like. N. was given line drawings of the front and back of an unclothed male figure and was asked to mark the area where he made her touch him. N. circled the penis and stated that, on one occasion, he made her touch him there with her hands.

N. testified that she told her mother about the touching, although she did not remember if she had told her mother "all that." N. said that she did not remember if her mother responded.

After telling her mother about the abuse, N. continued to see "elmer." The prosecutor asked N. if she saw him "a lot" after telling her mother. N. responded, "Probably."

C. Testimony of N.'s Mother

Ms. R. testified in the State's case, with the assistance of an interpreter. She said that N. had never met her biological father, who lived in another country. Ms. R. received no financial support from N.'s father.

Ms. R. began dating Castillo in 2017. At that time, N. was four or five years old. Ms. R. testified that Castillo "sometimes" slept in the apartment that she and N. shared with several other people.

In February 2020, Ms. R. sustained an injury to her arm and was unable to work. Castillo helped Ms. R. to buy food and medication.

At some point in 2020, Ms. R. learned that the lease for her apartment would not be renewed. Ms. R. was then pregnant and on complete bedrest. She testified that Castillo found an apartment for her to rent and that she and N. moved there in November or December 2020. The baby was born in December of 2020.

According to Ms. R., Castillo paid the rent for the new apartment, but he did not sleep there. Ms. R. testified that Castillo "just came to drop the food[.]" She stated: "[h]e came and stayed for three, four hours maximum during the day. And during the

weekend when he came to drop the food he would come just to the entrance, drop the food, and le[ave.]"

Ms. R. denied that N. told her that Castillo was "doing anything bad" to her. When asked whether she believed N.'s account of sexual abuse, Ms. R. responded, "I have my doubts. . . . [N.] was telling me that she had lied."

The defense did not call any witnesses. As stated earlier in this opinion, Castillo was convicted of all charges.

QUESTIONS PRESENTED

On appeal, Castillo presents five questions, which we have rephrased, where necessary, for clarity:

1. Did the court err by allowing Ms. Allen and Ms. Kulow-Malave to testify that N.'s pretrial statements did not appear to be "coached"?

2. Did the court err by allowing Ms. Allen to testify that N.'s initial report of sexual abuse "seem[ed] credible"?

3. Did the court abuse its discretion in denying a motion for mistrial after Dr. Shukat opined that N.'s account of sexual abuse was "credible"?

4. Did the trial court err in allowing Dr. Shukat to testify as to matters that were purportedly not disclosed in the State's discovery responses?

5. Did the trial court abuse its discretion by asking the venire on voir dire, "Is there anyone that could not convict on testimony alone if that testimony is believed beyond a reasonable doubt?"[5]

[5] The questions from Castillo's brief are:

1. Did the trial court err by allowing the testimony of Katherine Allen and Sara Kulow-Malave that [N.] had not been coached by someone else?

For the reasons stated below, we shall reverse the convictions and remand the case for a new trial. We find it unnecessary to address the fourth question, as that issue will not recur in a second trial.

DISCUSSION

I. Testimony Regarding N.'s Credibility

Ordinarily, "the admission of evidence is committed to the sound discretion of the trial court." *Portillo Funes v. State*, 469 Md. 438, 479 (2020). In general, an appellate court will "'not disturb a trial court's evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.'" *Bey v. State*, 228 Md. App. 521, 535 (2016) (quoting *Moreland v. State*, 207 Md. App. 563, 568-69 (2012)).

"In a criminal case tried before a jury," however, "a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Bohnert v. State*, 312 Md. 266, 277 (1988); *accord Fallin v. State*, 460 Md. 130, 136 (2018); *id.* at 154.

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2. Did the trial court err by allowing the testimony of Katherine Allen, that [N.] made a "credible" report of sexual abuse?

3. Did the trial court abuse its discretion by refusing to grant a mistrial?

4. Did the trial court err by allowing Dr. Shukat's testimony regarding why [N.] had not immediately disclosed the abuse?

5. Did the trial court err by asking the venire on *voir dire*, "Is there anyone that could not convict on testimony alone if that testimony is believed beyond a reasonable doubt?"

More than 30 years ago, Maryland's highest court laid down these governing principles:

> We have never indicated that a person can qualify as an "expert in credibility," no matter what his experience or expertise. We have insisted that, in a jury trial, the credibility to be given a witness and the weight to be given his testimony be confined to the resolution of all of the jurors. It is the settled law of this State that a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law.

Bohnert v. State, 312 Md. at 278; *accord Fallin v. State*, 460 Md. at 136.

"This is not to say that a witness may not offer the jury general information that may be useful to the jury in making the credibility determinations, such as character evidence or tools related to the assessment of credibility." *Fallin v. State*, 460 Md. at 154. But "a trial court may not ordinarily permit questioning that calls for one witness to assess the credibility of testimony or statements made by another witness concerning the facts of the case." *Id*.

Thus, for example, in *Bohnert v. State*, 312 Md. at 278-79, the Court held that a circuit court committed reversible error in permitting a social worker to offer an expert opinion that the alleged victim "in fact was sexually abused." The expert's opinion "was tantamount to a declaration by her that the child was telling the truth and that [the defendant] was lying." *Id.* at 278-79. "[T]he opinion was inadmissible as a matter of law." *Id.* at 279.

Similarly, in *Hutton v. State*, 339 Md. 480, 505 (1995), the Court held that a circuit court erred in two respects—first, in permitting an expert social worker to testify

that she found "consistency" in the child's statements; and second, in permitting an expert psychologist to testify that the alleged victim of child sexual-abuse could not have been faking the symptoms of post-traumatic stress disorder. The social worker "indirectly" indicated an opinion as to the child's truthfulness by commenting on the consistency of her statements. *Id.* The psychologist had "necessarily stated her opinion on the victim's credibility[,]" which was "outside her area of expertise and, indeed, invaded the province of the jury." *Id.*

Most recently, in *Fallin v. State*, 460 Md. at 157, the Court held that the circuit court erred in permitting an expert forensic examiner to testify that she had no concern that the alleged victim of child sexual-abuse was fabricating her story, that she had no concern that the child was being coached, that she observed no signs that the child was being coached or had fabricated her account, and that there was no indication that the child was "incorrect" in identifying the defendant as her abuser. The expert "did not so much advise the jury on how to assess a witness for signs of fabrication as provide her own conclusions on the credibility of the primary prosecution witness." *Id*. at 156. "The inevitable conclusion from that testimony, which the prosecutor asked her to draw explicitly, was that [the child's] statements concerning touching incidents by [the defendant] were not 'incorrect'—*i.e.*, true." *Id*. at 157.

A. Testimony Regarding "Coaching"

The State asked Ms. Allen and Ms. Kulow-Malave the same question: whether there was "anything that occurred" during their interviews with N. that "would have led [them] to believe that [N.] had been coached[?]" Over objection, both witnesses

answered, "No." Castillo contends that, in both instances, the witnesses "conveyed to the jury their opinion that [N.] was being truthful[,]" and, therefore, that the court erred in admitting their testimony. He is correct.

This case falls squarely within the ambit of *Fallin v. State*, 460 Md. at 152, 156, where the Court held that the circuit court committed reversible error in admitting a forensic examiner's opinion that the alleged victim of child sexual abuse showed no signs of fabrication or coaching. Like the experts in *Fallin*, Ms. Allen and Ms. Kulow-Malave, "did not so much advise the jury on how to assess a witness for signs of fabrication as provide [their] own conclusions on the credibility of the primary prosecution witness." *Id*. at 156. Like the circuit court in *Fallin*, therefore, the court in this case committed reversible error in permitting Ms. Allen and Ms. Kulow-Malave to testify that they saw no signs of coaching.

The State attempts to distinguish this case from *Fallin* on the ground that neither witness testified as an expert. That distinction is untenable. "'[A] witness, *expert or otherwise*, may not give an opinion on whether he believes a witness is telling the truth.'" *Fallin v. State*, 460 Md. at 136 (quoting *Bohnert v. State*, 312 Md. at 278) (emphasis added).

The State also attempts to distinguish this case from *Fallin* because, here, the prosecutor "asked isolated questions, neither of which led to an answer about whether abuse had actually taken place." The distinction, too, is untenable. The challenged testimony in this case is functionally identical to the testimony that was held to be inadmissible in *Fallin.* Like the witness in *Fallin*, Ms. Allen and Ms. Kulow-Malave

both testified that they did not observe anything that would lead them to believe that N. had been coached. As in *Fallin*, the "inevitable conclusion" to be drawn from their testimony was that N.'s account of sexual abuse was credible.[6]

The State goes on to argue that, even if the court erred in permitting two witnesses for the State to testify that they thought the allegations were credible, the error was harmless beyond a reasonable doubt. The State's argument is devoid of merit.

"[T]o establish that an error was harmless, the State must show beyond a reasonable doubt that the 'evidence admitted in error in no way influenced the verdict.'" *Gross v. State*, 481 Md. 233, 259 (2022) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). "The question for the reviewing court is 'whether the trial court's error was unimportant in relation to everything else the jury considered in reaching its verdict.'" *Paydar v. State*, 243 Md. App. 441, 458 (2019) (quoting *Dionas v. State*, 436 Md. 97, 118 (2013)). "'[W]here credibility is an issue . . . an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error.'" *Id.* (quoting *Dionas v. State*, 436 Md. at 110).

Here, N.'s credibility was the only issue before the jury. As in many cases of child sexual abuse, there were no corroborating eyewitnesses. Nor was there any physical or forensic evidence tending to establish that the incidents of inappropriate

[6] The witnesses can testify about facts from which the jury could infer that N. had not been coached. For example, Ms. Allen can testify (as she did) that her visit was unannounced, and the State can use that testimony to argue that N. could not have been coached. But *Fallin* prohibits the witnesses themselves from offering an opinion or conclusion about whether N. had been coached.

touching had occurred. N.'s mother testified that she had "doubts" about N.'s account and that N. had admitted to lying. On these facts, we are not able to conclude that the challenged testimony was "unimportant" in relation to the other evidence at trial or that it in no way influenced the verdict. The error was not harmless, and the judgments must be reversed.

B. Ms. Allen's Testimony

Ms. Allen, the first investigator to speak with N., believed that she was investigating a case of physical abuse because of what N. had told her teacher. Ms. Allen stopped the interview when N. started talking about sexual abuse.

During Ms. Allen's direct examination, the prosecutor asked if N. mentioned when the incidents of sexual abuse occurred. Ms. Allen responded that she did not. She explained that she was not a sexual-abuse investigator and that she had been trained that "once we receive information that seems credible and—that we are to stop the interview and turn it over to a sex abuse—the sex abuse team."

Defense counsel objected and moved to strike the testimony on grounds that it was a comment on the credibility of another witness. The court overruled the objection. It reasoned, first, that Ms. Allen was "not testifying about the witness's testimony in court"—a statement that fails to recognize that *Bohnert*, *Hutton*, and *Fallin* all involved a witness's testimony about the alleged victim's *out-of-court* statements. The court went on to say that the comment meant only that N.'s statement was "sufficiently credible to pass it on to the appropriate section that handles that kind of stuff, to see if in fact it did happen."

In view of our disposition of the first issue in this appeal, we need not decide the subtle question of whether Ms. Allen's testimony should be taken literally, as a comment on N.'s credibility, or whether it should be taken simply as an explanation for why Ms. Allen stopped the questioning and gave the case to the "sex abuse team." Suffice it to say that, if the State poses a similar question to Ms. Allen on remand, she should endeavor to respond neutrally, without commenting, even indirectly, on whether N.'s account was "credible."[7]

C. Dr. Shukat's Testimony

Castillo challenges two rulings concerning Dr. Shukat's testimony.

First, during cross-examination, when defense counsel asked Dr. Shukat to concede that she was not there "to testify as to whether or not the things [N.] said happened actually happened," the doctor responded:

> I'm here to tell you the results of what my patient said in a meaningful manner and report that. . . . I don't investigate, I don't go to the house or anything like that. But *N.'s comments and statements were consistent with child abuse*.

(Emphasis added.)

Defense counsel objected to the answer on grounds that the witness was vouching for N.'s credibility. The court overruled the objection.

Second, on redirect examination, the State asked Dr. Shukat about factors that might raise concerns about fabrication. In the course of a long statement that was largely

[7] E.g.: "I had been trained to stop the interview and refer the case to the sex abuse team once I received information of this nature." Or "I had been trained to stop the interview and refer the case to the sex abuse team in circumstances like these."

unresponsive to the specific question that she had been asked, Dr. Shukat volunteered that, "*in [her] opinion, [N.'s] history of child abuse was credible.*" (Emphasis added.)[8]

At the conclusion of Dr. Shukat's testimony, defense counsel moved for a mistrial. Counsel argued that Dr. Shukat's opinion regarding the credibility of N.'s account of sexual abuse was inadmissible and invaded the province of the jury. The court denied the motion. In explaining its ruling, the court asserted that Dr. Shukat "never said, my opinion is that [N.] was credible."[9]

We shall discuss each of these issues in turn.

First, Castillo contends that Dr. Shukat's testimony, that N.'s statements were "consistent with child abuse," was improper because it constituted an opinion on N.'s "consistency" and "truthfulness." We disagree. The testimony did not advise the jury that N.'s statements were credible, but only that the statements described acts of sexual abuse. *Accord Brooks v. State*, 439 Md. 698, 733 (2014) (nurse's testimony that victim's injuries were "consistent with" the victim's account of assault did not necessarily "endorse any particular version of the truth"). The court did not err in overruling Castillo's objection to that aspect of Dr. Shukat's testimony.

Second, Castillo contends that the trial court erred in denying his motion for mistrial. He asserts that Dr. Shukat's opinion, that N.'s account of child abuse was

[8] *See supra* n.4 for the entire question and answer.

[9] The court is correct that Dr. Shukat did not use the precise words, "in my opinion, N. was credible." She said, "in my opinion, [N.'s] history of child abuse was credible." Although the words of those two sentences are slightly different, there is no material difference in their meaning.

"credible," was inadmissible because it encroached on the jury's function to assess credibility and resolve contested facts. He argues that the prejudicial effect of the testimony deprived him of his right to a fair trial.

In light of *Bohnert*, *Hutton*, and *Fallin*, there is no serious question that an expert, like Dr. Shukat, cannot offer an "opinion"—which is what Dr. Shukat said she was doing—about whether a child's "history of child abuse was credible." The opinion "was tantamount to a declaration by her that the child was telling the truth[.]" *Bohnert v. State*, 312 Md. at 278. Had Castillo objected to Dr. Shukat's opinion, the court should have sustained the objection; had Castillo moved to strike Dr. Shukat's opinion, the court should have granted the motion. The opinion "invaded the province of the jury" (*Hutton v. State*, 339 Md. at 505) and led to the "inevitable conclusion" that N.'s account was "true." *Fallin v. State*, 460 Md. at 157. It "was inadmissible as a matter of law." *Bohnert v. State*, 312 Md. at 277.[10]

The issue before us, however, is not whether the court should have sustained an objection or stricken Dr. Shukat's testimony; it is whether the court abused its broad discretion when it denied a motion for a mistrial.

"'A mistrial is no ordinary remedy[.]'" *Winston v. State*, 235 Md. App. 540, 569 (2018) (quoting *Cooley v. State*, 385 Md. 165, 173 (2005)). Rather, it is "'an extreme

[10] Dr. Shukat can testify about facts from which the jury can infer that N.'s account is credible. For example, Dr. Shukat can testify (as she did) that N. reported feelings of pain that were beyond the knowledge of a seven-year-old child. On the basis of that testimony, the State can argue that N.'s account is credible. But Dr. Shukat may not opine that N.'s history of child abuse is credible.

sanction' to which courts sometimes must resort 'when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice[.]'" *Id.* (quoting *Burks v. State*, 96 Md. App. 173, 187 (1993)). "[T]he determining factor as to whether a mistrial is necessary is whether the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial." *Id.* at 569-70 (cleaned up).

We need not decide whether this case is one of the few that satisfies that daunting standard, because we are reversing the judgments on other grounds and remanding the case for a new trial. We trust that, on remand, Dr. Shukat will refrain from offering an opinion that N.'s "history of child abuse was credible," or any similar opinion. If she does not refrain from doing so, and if the defense registers a timely objection, we trust the circuit court will rule appropriately. The decision about whether to grant or deny a mistrial will be vested, in the first instance, in the circuit court judge—the person who has a "finger on the pulse of the trial." *See*, *e.g.*, *Hawkins v. State*, 326 Md. 270, 278 (1992).

II. Voir Dire

Because Castillo's final issue may recur on remand, we address it to the extent necessary to provide guidance at a second trial. *See, e.g.*, *Odum v. State*, 156 Md. App. 184, 210 (2004).

During voir dire, the trial court inquired of the jury panel: "Is there anyone that could not convict on testimony alone[,] if believed beyond a reasonable doubt[?]"[11] There were no affirmative responses.

Castillo contends that the court erred in asking the question as worded because, he says, (1) "[t]he effect of the question was to inculcate in the minds of the jurors the State's theory" that N.'s testimony, without more, was sufficient to convict Castillo, and (2) the question "suggested that the only option was to convict[.]"

"'The overarching purpose of [*voir dire*] in a criminal case is to ensure a fair and impartial jury.'" *State v. Ablonczy*, 474 Md. 149, 158 (2021) (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)). In Maryland, which employs "limited voir dire," the "sole purpose of *voir dire* questioning is to determine whether prospective jurors should be struck for cause, not to elicit information for the exercise of peremptory strikes in the second stage of jury selection." *Kidder v. State*, 475 Md. 113, 125 (2021).[12]

[11] The court posed virtually identical versions of the same voir dire question to two separate jury panels, because the first panel was insufficient to complete the jury selection process. The first panel was asked, "Is there anyone that could not convict on testimony alone[,] if believed beyond a reasonable doubt[?]" The second panel was asked, "[I]s there anyone . . . that could not convict on testimony alone, if that testimony is believed beyond a reasonable doubt[?]"

[12] Peremptory challenges allow "'a party to eliminate a prospective juror with personal traits or predilections that, although not challengeable for cause, will, in the opinion of the litigant, impel that individual to decide the case on a basis other than the evidence presented.'" *Pietruszewski v. State*, 245 Md. App. 292, 302 (2020) (quoting *King v. State Roads Comm'n of State Highway Admin.*, 284 Md. 368, 370 (1979)).

Two areas of examination may reveal cause for disqualification of a juror: "(1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over [the juror]." *Washington v. State*, 425 Md. 306, 313 (2012).

"The 'extent of the examination [of potential jurors] rests in the sound discretion of the court[.]'" *State v. Ablonczy*, 474 Md. at 157 (quoting *Langley v. State*, 281 Md. 337, 341 (1977)). This Court "review[s] the trial judge's rulings on the record of the voir dire process as a whole for an abuse of discretion[.]" *Washington v. State*, 425 Md. at 314.

We perceive no abuse of discretion in this case. The court could certainly have chosen not to ask this particular question. *See*, *e.g.*, *Costley v. State*, 175 Md. App. 90, 114 (2007) (stating that a court, in its discretion, may choose not to ask "catechising" questions even though it would not have been error to have asked them). The question, however, was not entirely inappropriate in this case, where the only evidence to support a conviction would be the testimony of a single witness. The question was tailored to probe potential jurors as to whether they would be biased against a witness whose testimony was not corroborated. The question was not tied to any of the facts of the case and therefore did not "inculcate" the minds of the panel members with the State's theory of the case.

In advocating a contrary conclusion, Castillo relies on *Charles v. State*, 414 Md. 726 (2010). In *Charles*, the trial court asked the members of the venire panel: "[I]f you

are currently of the opinion or belief that you cannot convict a defendant without 'scientific evidence,' regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law, please rise[.]" *Id.* at 730 (emphasis omitted). The Court held that the trial court abused its discretion in propounding the question as worded because the question "suggested that the jury's only option was to convict, regardless of whether scientific evidence was adduced." *Id.* at 737.

That is not the case here. Here, the court asked: "Is there anyone that could not convict on testimony alone if [that testimony is] believed beyond a reasonable doubt[?]" As worded, the question implied that a conviction was not inevitable if the jury did not find the testimony to be credible.

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