UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1426

September Term, 2013

MICHAEL DAVID BROCHU

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: July 9, 2015

Appellant Michael David Brochu was indicted in the Circuit Court for Prince George's County on 30 counts stemming from the alleged sexual abuse of an eight-year-old boy, "D.G."[1] After a three-day trial, and two days of intensive deliberations, the jury convicted Brochu of one count of sexual abuse of a minor, one count of second-degree sexual offense, and one count of unnatural or perverted sexual practice. Brochu took a timely appeal of the judgments. We reverse.

QUESTIONS PRESENTED

Brochu raises six issues on appeal, which we have rephrased as follows:

1. Did the trial court err in limiting the defense's cross-examination of the alleged victim?

2. Did the trial court abuse its discretion in permitting the State to elicit a prior inconsistent statement from the alleged victim in his direct testimony?

3. Did the trial court err in granting the State's motion *in limine* to exclude certain testimony by the defense's social worker witness?

4. In a case in which eyewitness identification was not an issue, did the trial court err in giving a superfluous jury instruction that the testimony of a single eyewitness, if believed beyond a reasonable doubt, can suffice to convict the defendant of "the crime"?

[1] We refer to the victim and members of his family by their initials in order to protect their identities. Accordingly, we shall refer to the victim as "D.G.," to his older brother as "R.G.," and to their mother and father, respectively, as "Ms. G" and "Mr. G." *See*, *e.g.*, *Muthukumarana v. Montgomery Cnty.*, 370 Md. 447, 458 n.2 (2002); *see also Thomas v. State*, 429 Md. 246, 252 n.4 (2012).

5. Did the trial court err in denying the defense's motion for a mistrial?

6. Does the sentence for unnatural or perverted practice merge into the sentence for second-degree sexual offense?

We agree that the court erred in limiting the cross-examination of the victim (Issue 1) and in giving a superfluous jury instruction that assumed that a crime had been committed (Issue 4). Under the circumstances of this case, we cannot conclude that those errors were harmless beyond a reasonable doubt. Consequently, we shall reverse the convictions.

Our disposition of the case makes it unnecessary to address the propriety of the denial of the motion for a mistrial (Issue 5) or the criminal sentence (Issue 6). For guidance on retrial, however, we shall address the additional evidentiary issues that Brochu has raised (Issues 2 and 3).

FACTUAL HISTORY

In a 30-count indictment, the State alleged that Brochu had sexually abused D.G., his nine-year-old neighbor, on numerous occasions between September 2011 and the summer of 2012. After hearing from D.G., Brochu, and other witnesses, the jury convicted Brochu of abusing D.G. on only one of those occasions.

The State's proof began with Ms. G., D.G.'s mother. Ms. G. testified that her relationship with Brochu and his wife, Connie, went back as far as 2001 and that they

had become close. Upon the birth of their oldest son, R.G., Ms. G. and her husband asked the Brochus to become R.G.'s godparents because of the friendship and because Connie, like Ms. G., was a native Spanish speaker. The G. family moved to a house next door to the Brochus' in 2008.

Ms. G. testified that D.G. and R.G. would play next door with Brochu's six-year-old grandson, J.,[2] both inside and outside the Brochu home. R.G. would occasionally cut Brochu's lawn, and on one occasion both boys helped Brochu paint rooms in his house. Ms. G. trusted Brochu and his daughter, Erin, to help look after her children, and she was comfortable with D.G. being next door with Brochu and Erin. During the entire period from September 2011 to July 2012, she was unaware that any sexual abuse had occurred.

D.G. testified that he was seven or eight years old and in the third grade at the time in question. He stated that he had a good relationship with Brochu. He reiterated his mother's testimony that Brochu was a close family friend and that he and his brother would often go next door to play with J. When D.G. was next door, he said, Brochu or Erin would watch over them.

[2]We refer to "J." by his initial not because he is alleged to have been a victim of sexual abuse, but because of young age.

Erin, who has spina bifida, a developmental congenital spinal disorder, used crutches and stayed in the first floor of Brochu's garage. D.G. testified that Brochu occasionally would pull down a ladder from the garage attic and ask D.G. to join him up there. The attic had no windows.

D.G. testified that in September 2011 Brochu put his hand under D.G.'s clothes and starting touching D.G.'s penis while they were alone, together in the attic. D.G. testified that he did not tell anyone about the incident until many months later, because Brochu had told him that he (D.G.) would get in a lot of trouble if he did.

D.G. testified that, at some time "between February and March" 2012, Brochu touched his (D.G.'s) penis over his clothes. According to D.G., the incident occurred in a parking lot while they were driving Brochu's daughter's Mustang. From D.G.'s testimony, it appears that he was steering the car while sitting in Brochu's lap, as Brochu operated the pedals. Again, D.G. stated that because of Brochu's admonition, he told nobody about this incident.

D.G. testified further that in May 2012, when Erin was not at home, Brochu told him to come up to the attic, pulled down D.G.'s pants, and put his mouth on D.G.'s penis. D.G. said that Brochu warned him not to tell anyone about the incident.

About two days later, D.G. testified, Brochu again put his mouth on D.G.'s penis while they were together in the attic. D.G. testified that Brochu stopped when his

grandson, J., shone a flashlight on him. D.G. said that because of Brochu's warnings, he told no one about the incident.

D.G. testified that Brochu did not try to touch him again after that incident. D.G. also testified, however, that in June 2012, while he and Brochu were in the shower at the local pool, he saw Brochu rub his own penis, causing a liquid to come out. D.G. testified that, while Brochu was rubbing his own penis, he (Brochu) was watching to see whether anyone else came into the shower. As with the other incidents, D.G. testified that because of Brochu's warnings, he told no one about what had occurred.

According to D.G., the final incident of abuse occurred in July 2012. D.G. said that, while he and Brochu were in the attic, Brochu touched his own penis and told D.G. to touch his (Brochu's) testicles.

D.G. testified that he told his father about these incidents in the summer of 2012. He said that he also spoke with a Kristine Herold, a licensed clinical social worker with the Prince George's County Department of Social Services; a police detective and a police social worker; and the prosecutor and her assistant. Over objection, the court permitted D.G. to testify that because of Brochu's warnings, he initially told Herold that nothing had happened. D.G. testified that he later told the police what he remembered, and, as he remembered more, he told the prosecutor as well.

On cross-examination, Brochu's counsel identified a number of inconsistencies in D.G.'s testimony. D.G. admitted that when he talked to the police about the incidents of abuse, he told them (contrary to what he had testified on direct examination) that J. was in fact present at the first incident in the attic. D.G. also seems to have admitted that the "last incident" of abuse was the incident in the attic in which J. shined a flashlight on Brochu. In addition, D.G. testified that he told a police detective that he had lied to Kristine Herold when he told her no unwanted touching had occurred. D.G. said that he told the detective that the reason for his lie was not because of Brochu's admonitions, but because he was nervous and afraid of getting into trouble.

As part of his defense, Brochu called his daughter Erin to the stand. Erin testified that she had always lived with Brochu and was living in his home at the pertinent times of 2011 and 2012. Erin corroborated the testimony that J. was friendly with D.G. and that she often supervised the children when D.G. (and R.G.) came over to play with J. According to Erin, Brochu generally returned from work at 5:30 p.m. on weekdays. In the early evenings and on weekends, she said, Brochu also played with and supervised the children.

Brochu testified in his own defense. He stated that, over the course of the period in question, D.G. would come over to his house a couple times a week to play with his grandson, J. Ms. G. was welcome at the house as well, he said, and would check in

periodically with her two sons when they were next door. Brochu testified that Ms. G. had given D.G. permission to play in Brochu's attic and that whenever the attic ladder was down, the garage door would be open. Brochu further testified that his daughter's Mustang was not operational in early 2012, when Brochu was alleged to have sexually abused D.G. as they drove in the vehicle. Brochu denied ever having sexually abused D.G. The State asked virtually no questions of Brochu on cross-examination.

Brochu also called a co-worker, who testified that he knew of no incidents of dishonesty on Brochu's part, and an official from the pool, who testified about the open and accessible layout of the shower room.

Before the court submitted the case to the jury, the State voluntarily dismissed 15 of the 30 counts, and the court granted Brochu's motion for judgment of acquittal with respect to three others. On the 12 remaining counts, the jury deliberated over the course of two days. During that time the jurors sent out multiple notes, including one in which they informed the court that they were deadlocked (and prompted an *Allen* charge). At the end of the second day, after giving additional indications that they were still having difficulty reaching a unanimous verdict, the jury found Brochu not guilty on nine counts, but guilty on three. The guilty verdicts, for sexual abuse of a minor, second-degree sexual offense, and unnatural or perverted sexual practice, all stemmed from the first of two allegations of fellatio in May 2012.

The court denied Brochu's motion for a new trial and sentenced him to a total of 41 years' of executed prison time: 21 years for sexual abuse of a minor (Count 14); 20 years, to run consecutively to Count 14, for second-degree sexual offense (Count 15); and ten years, all suspended, to run consecutively to Count 15, for unnatural or perverted sex practice (Count 16). The judge attached a five-year probationary period to Count 16, and, for sentencing purposes, merged the conviction for Count 16 into the conviction for Count 15.

DISCUSSION

I. Limits on Cross-Examination

Brochu argues that the trial court erred in unduly limiting the scope of his cross-examination of D.G. and that, as a result, he was denied his right to a fair trial. We agree.

A. Factual Background

Brochu's complaint centers on four discrete occasions when the court sustained the State's objections to questions that his counsel attempted to ask during the cross-examination of D.G.

In the first exchange, counsel attempted to impeach D.G.'s testimony that J. was not present at the first incident of sexual abuse. To that end, Brochu sought to introduce

D.G.'s statement to the police detective that J. had in fact been present during the first incident.

In the second exchange, counsel attempted to establish that D.G. told the police detective and a social worker that J. was present at the final incident of abuse and saw what occurred.

In the third exchange, counsel attempted to impeach D.G.'s testimony that he did not tell the first social worker, Kristine Herold, of the sexual abuse, because of Brochu's warnings. Counsel sought to introduce D.G.'s statement to the detective that he had lied to Ms. Herold because he was nervous and feared getting into trouble.

In the fourth exchange, counsel attempted to elicit an acknowledgment that D.G.'s father had pressured him into telling the police that Brochu had sexually abused him.

B. Legal Standard

The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the right to confront the witnesses against them. *See*, *e.g.*, *Martinez v. State*, 416 Md. 418, 428 (2010) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Church v. State*, 408 Md. 650, 663 (2009)). This right includes the opportunity to cross-examine witnesses about matters relating, among other things, to their biases,

interests, or motives to testify falsely. *See, e.g.*, *Martinez*, 416 Md. at 428 (citing *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)).

"The ability to cross-examine witnesses, however, is not unrestricted." *Martinez*, 416 Md. at 428. A trial court may exercise its discretion to "impose reasonable limits on cross-examination when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Id.* (citation omitted). These limits do not infringe a defendant's confrontation rights so long as "defense counsel has been 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness[.]'" *Id.* (quoting *Davis v. Alaska*, 415 U.S. at 318). Still, a trial court should not limit cross-examination until the defendant has reached "the 'constitutionally required threshold level of inquiry.'" *Martinez*, 416 Md. at 428 (quoting *Smallwood v. State*, 320 Md. 300, 307 (1990)) (internal quotation marks omitted). On appellate review, we determine whether the trial judge's limits on cross-examination inhibited the defendant's ability to receive a fair trial. *Pantazes v. State*, 376 Md. 661, 681-82 (2003).

Where a court has improperly limited cross-examination, reversal is mandated "'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

verdict[.]" *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

C. Analysis

Brochu contends that he was denied his right to a fair trial because of the court's "erroneous rulings sustaining the State's obstructionist objections" to defense counsel's attempts to impeach D.G. through prior statements. The State responds that, despite the objections and the rulings thereon, Brochu managed to convey the essence of all of his key points. We agree that, through the diligence and perseverance of his counsel, Brochu was able to convey most of his points (though not in a particularly orderly or effective manner). The court, however, erroneously blocked Brochu from establishing one key point, which was whether D.G.'s father had pressured him into telling the police that Brochu had sexually abused him.

We shall address each of Brochu's complaints of error in turn.

As to Brochu's first complaint (concerning D.G.'s testimony that J. was not present at the first incident of sexual abuse), the trial court thwarted defense counsel's attempts to impeach D.G.'s testimony by showing him a redacted videorecording and (later) a transcript of the interview in which D.G. told a police detective that J. *was* present at the first incident. The court appears to have agreed with the State's erroneous argument that D.G. was entitled to view the recording, outside of the jury's presence,

before Brochu could question him about the transcript. *But see* Md. Rule 5-613(a) ("[a] party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time . . . ."). A few moments later, the court sustained what appears to have been a hearsay objection to a context-framing question about what the detective said to D.G. even though Brochu was plainly not offering the detective's statement for hearsay purposes. Nonetheless, "[w]hen defense counsel was finally able to ask the question he wanted to ask without interference, [D.G.] admitted that he had told the social worker and the detective that [J.] was present at the time of the first alleged incident." Appellant's Brief at 9.

As to Brochu's second complaint (concerning D.G.'s prior statements that J. was present at the final incident of sexual abuse), the court sustained objections to questions about what D.G. had told the detective and about what the social worker told him (even though the statement appears not to have been offered statement for hearsay purposes), and about what J. saw. Very soon thereafter, however, defense counsel established that D.G. did not remember whether he had previously told the social worker and the detective that J. "saw the last incident." D.G. was then permitted to answer that J. was

present during that incident, that J. shined a flashlight in the direction of D.G. and Brochu, and that a person in J.'s position would have seen what was happening.[3]

As to Brochu's third complaint (concerning the reason why D.G. did not tell Kristine Herold of the alleged abuse), the court initially sustained an objection to a question about whether D.G. had told the detective and the social worker that he denied the abuse because he was nervous and thought he would get into trouble. The court incorrectly reasoned that the statement was, in the court's words, not "truly" inconsistent with D.G.'s direct testimony (that he told Herold that nothing happened because of Brochu's warnings), because D.G. later told the detective that he had said nothing had happened because Brochu had made him promise not to say anything. A few minutes later, however, counsel succeeded in establishing that D.G. told the detective and the social worker that he had lied to Herold because he was nervous and thought that he would get into trouble. "D.G. later agreed that he had told [the detective and the social worker] that he lied to [Ms. Herold] because he was nervous and thought he would get in trouble." Appellant's Brief at 10.

[3] The briefs do not clearly establish how this testimony was supposed to undermine D.G.'s testimony on direct examination. On direct, D.G. had testified that, during this incident in the attic, Brochu stopped when J. shined a flashlight on him. Perhaps the significance of the testimony about this "last incident" was to impeach D.G.'s testimony, on direct, that two subsequent incidents occurred thereafter (at the pool).

The fourth complaint (that counsel was unable to elicit testimony that D.G.'s father had pressured him to implicate Brochu) stands on a different footing. On cross-examination, the exchange proceeded as follows:

> Q. In between that time you spoke with Ms. [Herold] and then you spoke with Detective Praytor and Ms. Ashleigh together, did you have a conversation with your father?
>
> . . . .
>
> A. Yes.
>
> Q. Isn't it true your father told you –
>
> STATE: Objection.
>
> THE COURT: Sustained.
>
> Q. What did your father tell you after you lied to Ms. ---
>
> STATE: Objection.
>
> THE COURT: Sustained.
>
> . . . .
>
> Q. Did your Dad talk to you about what you said to Ms. [Herold] about nothing happening?
>
> D.G.: Yes.
>
> Q. What did he tell you?
>
> STATE: Objection, Your Honor.
>
> THE COURT: Sustained. That means don't answer.

In sustaining these objections, the court appears to have misunderstood the purpose of the questions: counsel's objective was not to introduce the father's statements for the truth of the matters asserted, but for the non-hearsay purpose of establishing that he had pressured or persuaded D.G. to change his account and to falsely implicate Brochu.

As previously stated, "a trial court may exercise its discretion to limit cross-examination only after the defendant has been afforded 'the constitutionally required threshold level of inquiry.'" *Martinez*, 416 Md. at 428 (quoting *Smallwood*, 320 Md. at 307) (internal quotation marks omitted). In the challenged rulings in this case, however, the circuit court was not making discretionary rulings about the scope of cross-examination, by, for example, imposing limits "when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Martinez*, 416 Md. at 428. Instead, the court sustained ill-founded objections concerning impeachment with prior inconsistent statements and hearsay. In doing so, the court erroneously limited Brochu's ability to cross-examine his accuser.

In view of the finding that the court erred, we must reverse the conviction unless we can conclude that the error was harmless beyond a reasonable doubt. *See*, *e.g.*, *Dionas*, 436 Md. at 107. "[H]armless error review 'is the standard of review most

favorable to the defendant short of an automatic reversal.'" *Id.* at 109 (quoting *Bellamy v. State*, 403 Md. 308, 333 (2008)).

"[T]he reviewing court must apply the harmless error standard in a manner that does not encroach upon the jury's judgment." *Id.*, 436 Md. at 109. Thus, where a trial court has excluded relevant evidence, we do not assess harmless error by looking at the weight of the other evidence that the court admitted, but by assessing the potential impact of the evidence that the court excluded. *See id.* at 109-10; *id.* at 116-117. "[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." *Id.* at 110. Instead, if the proffered cross-examination "'could have cast sufficient doubt on the prosecuting witness'[s] credibility [as] to render [him] unworthy of belief in the mind of at least one juror[,]'" we cannot find the error to be harmless. *Id.* at 111 (quoting *State v. Cox*, 298 Md. 173, 185 (1983)).

As for the first three areas of inquiry, the error was arguably harmless, because Brochu eventually established what he set out to establish (albeit in a disorderly and inefficient manner). As for the fourth area of inquiry, however, we cannot say that the error was harmless in the circumstances of this case.

D.G's veracity was the dominant issue in this case. D.G. had admitted to changing his story and had admitted to lying, on at least one occasion, about what had

occurred. It is undisputed that, after D.G. told Kristine Herold that nothing had happened between him and Brochu, he had a conversation with his father. It is also undisputed that, after the conversation with his father, D.G. changed his story and began to level accusations against Brochu.

Brochu understandably sought to establish that D.G.'s father said or did something to pressure or persuade him to change his story and to falsely implicate Brochu. The court, however, prevented Brochu from obtaining an answer to that important question. Because that question was "critical" to "the jury's assessment of who [was] telling the truth," *Dionas*, 436 Md. at 110, and "could have cast sufficient doubt on [D.G.]'s credibility [as] to render [him] unworthy of belief in the mind of at least one juror," *id.* at 111 (quoting *Cox*, 298 Md. at 185), we are constrained to conclude that the error was not harmless beyond a reasonable doubt. *See Dionas*, 436 Md. at 121 (finding no harmless error where court erroneously limited defendant's ability to cross-examine key witness about expectation of leniency).

In reaching this conclusion, we are mindful of how the trial unfolded, including "the jury's behavior during deliberations[.]" *Id.* at 111 (citing *Hunter v. State*, 397 Md. 580, 597 (2007)). Because of a failure of proof, the State was required to voluntarily dismiss half of the 30 counts at the end of its case, while the court granted Brochu's motions for judgment of acquittal on three more. The jury deliberated for a day and half

after a trial that encompassed less than three full days of testimony. During the lengthy deliberations, the jurors sent out several notes, including one that concerned the sufficiency of a child's testimony, another in which they reported that they were deadlocked, and another in which they requested a non-working lunch because they needed to step away from the deliberations. The court had to deliver a modified *Allen* charge on the first day of deliberations, and the defense moved for a mistrial on multiple occasions. At the very end of the second day, the jurors returned their verdict, in which they accepted D.G.'s account on only one of the six incidents about which he testified.

The "length of jury deliberations" (*Dionas*, 436 Md. at 112), the jury's expressed concern about the sufficiency of D.G.'s testimony (*see id.* at 111), the evident difficulty in reaching a unanimous verdict (*see id.*, quoting *Allen v. United States*, 837 A.2d 917, 922 (D.C. 2003)), and "'the possibility of a compromise verdict'" (*id*., quoting *Brooks v. United States*, 367 A.2d 1297, 1310 (D.C. 1976)), all militate in favor of the conclusion it was not harmless error to restrict Brochu's ability to cross-examine D.G. Consequently, we must reverse the convictions.

II. The Jury Instruction Regarding Eyewitness Identification

Although this case does not concern eyewitness-identification testimony, the circuit court delivered the pattern jury instruction on that topic:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who

> committed it. You have heard evidence about the identification of the defendant as the person who committed *the crime*. You should consider the witness's opportunity to observe *the criminal act* and the person committing it, including the length of time the witness had to observe the person committing *the crime*, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> The identification of the defendant by a single eyewitness, as the person who committed *the crime*, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* (MPJI-Cr) 3:30 (2d ed. 2012) (emphasis added).

Brochu contends that the instruction was not only inapplicable, but prejudicial because it repeated the State's argument that the jurors could convict Brochu even if D.G.'s testimony was uncorroborated. The State agrees that the instruction was superfluous, but citing *Brogden v. State*, 384 Md. 631 (2005), it argues that the instruction would be erroneous only if it altered the burden of proof. Because the instruction repeatedly assumes that a crime was committed, we believe that it was erroneous to give the pattern instruction in this case, in which the central issue was whether any crime at all was committed.

Md. Rule 4-325(c) provides, in pertinent part, as follows:

> The court may, and at the request of any party shall, instruct the jury as to *the applicable law* and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

(Emphasis added.)

Where, a party requests an instruction on eyewitness identification, the "trial judge must necessarily exercise discretion in assessing whether the instruction ought to be given and whether the issue of identification is fairly covered by other instructions." *Gunning v. State*, 347 Md. 332, 350 (1997); *accord Janey v. State*, 166 Md. App. 645, 657-58 (2006).

The *Gunning* Court explained the factors that ought to go into a trial court's consideration of whether an eyewitness identification instruction is necessary, or whether it should instead be rejected. We here quote at length:

> In many cases, detailed instructions on such issues as witness credibility and/or the burden of proof may adequately encompass the subject matter of a requested identification instruction. In other cases, however, because of the centrality of the identification issue and the nature of the eyewitness testimony, a separate identification instruction might be helpful to the jury . . . .
>
> [T]he trial judge must examine the unique circumstances of each case before rejecting a requested eyewitness identification instruction. In particular, the trial judge should consider whether there is a real issue of mistaken identity generated by the defense, as well as such factors as whether the identification testimony is questionable because of the circumstances surrounding either the witnesses' observations or the

> identification procedures, and whether there is corroborating evidence concerning the defendant's participation in the crime.

Id. at 350-51.

Looking to the factors discussed in *Gunning*, it is beyond any serious dispute that the eyewitness instruction did not belong in the case. Eyewitness identification was not an issue, let alone a central issue, in this case. This was not a case in which the defense accepted that a crime had occurred, but disputed an eyewitness's ability to accurately identify the defendant as the person who had committed that crime. Rather, this was a case in which it was hotly disputed whether any crime had occurred at all. The trial judge herself recognized that "identification really isn't the issue here": the instruction was not an instruction on the "applicable law." Md. Rule 4-325(c).

Although this Court once dismissed the notion that a superfluous instruction could ever give rise to grounds for reversal (*Perry v. State*, 150 Md. App. 403, 426-27 (2002)), the Court of Appeals has expressly rejected that proposition. *Brogden*, 384 Md. at 645 n.6. In *Brogden*, an armed burglary case in which the sole defense was that the State had not proved its case beyond a reasonable doubt, the jury raised a question about whether the defendant had a license to carry a firearm. Although neither party had raised any issue about the existence of a license, the circuit court responded by instructing the jury that the defendant had the burden of proving that he had a license. In giving that

instruction, the circuit court committed reversible error, because it shifted the burden of proof to the defendant. *Id.* at 651.

While the error in this case is not as stark as it was in *Brogden*, the superfluous and inapplicable instruction still had the impermissible effect of shifting the burden to the defense. Although the dispositive issue in this case was whether any crime had occurred, the instruction repeatedly refers to "the crime" – as if it were undisputed that a crime had occurred, and the only question was whether the defendant was the person who committed it. In a case as close as this one, where one person's testimony was pitted against another's on the issue of whether any crime had occurred, we cannot countenance the court's use of an inapplicable instruction that subtly endorsed one side of that dispute. For this additional, reason, therefore, we are constrained to reverse the conviction.

III. Additional Issues that May Arise on Remand

Although we reverse the conviction, Brochu has raised two additional issues that may arise on remand. We address those issues in turn.

A. Drawing the Sting

On direct examination, D.G. testified that he disclosed the alleged abuse in 2012. Soon afterward, the State asked D.G., "Did you tell everybody the same thing you're telling me now?" The defense objected on multiple grounds:

> There was two bases for my objection. Number one is it's leading, did you tell everybody the same story? But, secondly, it calls for hearsay. The

> substance of what he told out of court does not come in as a prior consistent statement because his credibility hasn't been attacked, nor can she impeach her own witness in general with a prior inconsistent statement. It's not something that a party proffering a witness is generally allowed to do unless it's a hostile witness. This witness is anything but. So, I had to move to preclude that. That's why I object.

The court overruled the objection, provided that D.G. answered either yes or no and did not disclose the substance of what he said. When asked again whether he had told everybody the same thing that he was telling the prosecutor in court, D.G. answered, "No." When asked why, D.G. responded, over objection, "The first time I said no [to Ms. Herold] because Mr. Brochu told me to say no." When asked whether he subsequently told everyone else the same thing, D.G. responded, over another objection, "I told the two agents the things I first remembered, then I told you the extra things that I remembered."

Brochu argues that the trial court erred when it admitted D.G.'s prior statements to Ms. Herold over defense counsel's objection, because it was inadmissible hearsay and because it was inadmissible as a prior inconsistent statement under Rules 5-613 and 5-616. We do not agree.

Hearsay is "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." Md. Rule 5-801(c). "By contrast, a statement that is offered for a purpose other than to prove its truth is not hearsay at all." *Ashford v. State*, 147 Md. App. 1, 76 (2002) (quoting

Hardison v. State, 118 Md. App. 225, 234 (1997)). Whether evidence is hearsay is an issue of law that appellate courts review de novo. *Bernadyn v. State*, 390 Md. 1, 8 (2005).

D.G. testified that he did not "tell everybody the same things" that he told the jury in court. For two reasons, the statement was not hearsay. First, the statement was not an out-of-court statement, but a statement that D.G. made in court about what he had done in the past (specifically, about how he had been untruthful). Second, the State did not offer D.G.'s statement that he had previously given an inconsistent account in order to prove that the inconsistent account was true; to the contrary, it introduced that testimony in order to prove that D.G.'s previous account was *untrue* and that he had previously spoken *untruthfully*. The statement was not inadmissible hearsay.

Nor was the statement inadmissible as a prior inconsistent statement. If a defendant, in opening statement, predicts that the jury will hear evidence that will open the door to other evidence that may rehabilitate a witness's credibility, the State may "draw the sting" by introducing that evidence on direct:

> Rehabilitation evidence . . . need not be confined to redirect examination. Anticipatory rehabilitation evidence may be introduced during the direct examination of a witness for the State if the opening statement of [the defendant's] trial counsel predicts that jurors will receive evidence that would – when presented – 'open the door' to the [rehabilitation evidence].

Fullbright v. State, 168 Md. App. 168, 184 (2006) (citations and quotation marks omitted); *accord* Md. Rule 5-616(c)(1) ("A witness whose credibility has been attacked may be rehabilitated by . . . [p]ermitting the witness to deny or explain impeaching facts . . .").

Here, Brochu's counsel introduced the issue of D.G.'s inconsistent accounts in his opening statement:

> The State will present the testimony of this eight-year-old. The testimony you will see will contain multiple implausibilities, things that just don't make sense in human life or common experiences. Things that were said on one day that were contradicted on another, and out right [*sic*] lies. They're actually going to call this young boy and he's going to admit at least some lies.

Under *Fullbright*, therefore, it was proper for the State to elicit evidence of D.G.'s inconsistent statements, and the reason for them, *before* Brochu was able to do so. On remand, the State may do so again if it chooses.

B. The Exclusion of Kristine Herold's Testimony

Brochu sought to call Kristine Herold, the social worker to whom D.G. initially denied being abused. Brochu intended to establish two points through Herold's testimony: first, that D.G. had made a prior inconsistent statement when he denied that Brochu had sexually abused him; and, second, that Herold had employed a "non-

threatening," forensic interviewing technique called "RATAC,"[4] which, Brochu said, is designed to "ascertain the most accurate and reliable information regarding the reporting of child abuse" and to "elicit difficult information from children." Brochu represented that even if someone had told a child to deny being abused, the RATAC techniques are designed to break down the child's resistance and to "foster[] the best chance of getting truthful and accurate information."

The State moved *in limine* to preclude the testimony, and the circuit court granted the motion. We perceive no error.

Ordinarily, under Md. Rule 5-613(b), a party cannot introduce extrinsic evidence of a prior inconsistent statement until "the witness has failed to admit having made the statement." Here, however, D.G. had not "failed to admit" to having told Ms. Herold that Brochu had not sexually abused him. To the contrary, D.G. had acknowledged, both on direct and on cross-examination, that he had lied to Ms. Herold and had denied that Brochu had abused him. Therefore, the court correctly prohibited Brochu from calling Ms. Herold to testify about the prior inconsistent statement that D.G. admittedly had made.

Similarly, the court correctly prohibited Ms. Herold from testifying about the RATAC technique. Because of the representations that the technique is designed to elicit

[4] "RATAC" stands for Rapport Building, Anatomy Identification, Touch Inquiry, Abuse Scenario and Closure.

truthful information, the court perceived that the jury might misinterpret Ms. Herold's testimony as an endorsement of the credibility or veracity of the statements that D.G. made in her interview. *But see Bohnert v. State*, 312 Md. 266, 278 (1988) (holding that "[t]estimony from a witness relating to the credibility of another witness is to be rejected as a matter of law"). It makes no difference that Brochu disclaimed any intention to elicit expert testimony from Ms. Herold: the court had the power to exclude the testimony if it might confuse or mislead the jury, Md. Rule 5-403, which could well occur if the jury heard testimony about the information that Ms. Herold elicited through the use of her special interviewing technique. On remand, therefore, the court need not admit Ms. Herold's proffered testimony.

CONCLUSION

We reverse Brochu's convictions because of the restrictions on cross-examination and the inapplicable jury instruction. We reject Brochu's other claims of error. We remand for a retrial solely on the Counts 14, 15, and 16, the counts on which Brochu was convicted.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ON COUNTS 14, 15, AND 16, REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.