Circuit Court for Baltimore City
Case No. 112181015

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1375

September Term, 2022

THOMAS L. COLES

v.

STATE OF MARYLAND

Ripken,
Tang,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 30, 2023

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

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In 2013, a jury sitting in the Circuit Court for Baltimore City convicted Thomas L. Coles, appellant, of child sexual abuse.[1] In 2022, we granted appellant's petition for post-conviction relief and request for a belated appeal.[2] Appellant raises two questions on appeal, which we have rephrased for clarity:

I. Did the circuit court err by allowing the victim's mother to testify that she believed the victim's allegation of sexual abuse?

II. Was appellant's trial counsel ineffective for failing to object to the allegedly inconsistent verdict?

[1] The jury acquitted appellant of second-, third-, and fourth-degree sexual offense, second-degree assault, and perverse or unnatural sexual practice. The court sentenced appellant to 25-years' imprisonment for the child sexual abuse conviction, all but 15 years suspended, and five years of probation with conditions, including that he register as a sex offender upon his release from prison.

[2] The following clarifies the quirky path by which this case is before us.

Appellant timely appealed his 2012 conviction for child sexual abuse. We dismissed his appeal, however, because he failed to order any transcripts. *See Coles v. State*, No. 1784, September Term, 2013 (CSA-REG-1784-2013). In 2021, appellant filed a petition for post-conviction relief raising three claims: 1) two claims that he was denied the effective assistance of trial counsel, and 2) one claim that he was denied the effective assistance of appellate counsel. The post-conviction court granted appellant's request for relief related to his appellate counsel claim and granted him the right to file a belated appeal from which this appeal arises. The post-conviction court, however, denied appellant's request for relief regarding his two claims related to his trial counsel.

Appellant subsequently filed an application for leave to appeal the denial of his petition for post-conviction relief on the two trial counsel claims. We granted in part and denied in part his application. *See Coles v. State*, CSA-ALA-1374-2022. We granted his application as to his claim that trial counsel was ineffective for not objecting to the trial court's supplemental jury instruction, and we transferred that issue to the direct appeal docket. *See Coles v. State*, ACM-REG-814-2023. Appellant's brief in that case is due on September 6, 2023. We denied his application as to his claim that the verdicts were legally inconsistent.

We shall answer appellant's first question in the affirmative and reverse. Because we are reversing appellant's conviction, we need not address the second question he raises.

FACTS

The State's theory of prosecution was that on May 6, 2012, appellant forced nine-year-old J.R. to perform fellatio on him while he was in the shower and then gave her money to lie about the crime. The theory of defense was that appellant did not sexually abuse J.R., that she was lying about what had happened. Four people testified at trial. Testifying for the State was J.R.; C.W, who is J.R.'s mother and appellant's former girlfriend; and lead detective Michael Hansen of the Baltimore City Police Department. Appellant testified in his defense.

In May 2012, C.W. and appellant, her boyfriend of about five years, lived together in a three-level house in Baltimore City with C.W.'s five children. Appellant was the father of the youngest two children, who were twins. J.R. was the middle child of the three older children, and she was nine years old. All the children slept upstairs: the twins slept in separate cribs in one bedroom; J.R.'s brothers slept in a second bedroom; and J.R. slept in a third bedroom but, at the time, was sleeping on the floor of her brothers' room because her bed was broken. There was a bathroom upstairs.

J.R. testified that on May 6, 2012, she was in her brothers' bedroom when appellant, whom she called "Snackman," told her "to go in the bab[ies'] room and I caught an attitude and threw my [pillows] in the floor on the hallway." Appellant then said to her, "If you suck my privates, you can go back [to her brother's room], and that's when I went and did it." She explained that while he stood in the shower, she sucked appellant's penis. She

demonstrated for the jury how he grabbed her head and pushed it on his penis. She described his penis as "brown" and "big." She testified that "white stuff" "[w]ent in my mouth" that tasted "nasty," and she "spit it in the toilet." After appellant ejaculated, appellant told her she could go back to her brothers' room.

According to J.R., she instead "went and got the phone and then came back in the bathroom" where appellant was taking a shower. J.R.'s mother unexpectedly entered the bathroom and "started fussin' at me." In response, J.R. became upset, started to cry, and told her mother, "he made me suck his thing[.]" Her mother "got mad" and took J.R. downstairs to the first floor, after which appellant came running downstairs and said, "I didn't do it."

Later that evening, appellant told J.R. that he would give her $2 "if I tell my mom that I just wanted the phone[,]" which apparently had games on it. She did not receive an allowance, and appellant had in the past given her money to buy snacks. The next day, appellant gave her $2, and she bought candy. When she came home from school that day with the candy, her mother asked her about it. When she told her mother that appellant had given it to her, her mother became upset and called the police.

C.W. testified that she came home around 1:00 a.m. on May 6, 2012, after having worked a 12-hour shift, and that appellant, as was his custom, let her into the house. J.R. ran down the stairs and gave her a hug. Surprised that her daughter was still up on a school night, C.W. sent J.R. upstairs to bed. Appellant then asked C.W. for oral sex, and she said, "No." He then told her that he was going to take a shower and went upstairs.

C.W. testified that she heard J.R.'s feet running back and forth upstairs, then stop, and then she heard them again. Thinking her daughter was disobeying her, she decided to quietly go upstairs to catch her daughter not in bed. She estimated that about half an hour elapsed from when she came home until she decided to quietly go upstairs. When she did not see her daughter in her bedroom or her brothers' room, C.W. looked in the bathroom and saw J.R. looking into the shower with a cell phone in one hand and the other hand against the wall holding the shower curtain open. Appellant was in the shower naked with his back toward them and soap on his body. C.W. testified that when she moved, they both "reacted."

Before C.W. had a chance to ask what was going on, J.R. started screaming and crying. J.R. told her mother, "He was trying to make me suck his privates. I told him no. I told him no. He keeps asking me to suck his privates." She then said that "she had started doing it." C.W. and appellant yelled at each other, after which C.W. left the house with her children, returning later that morning when appellant left for work and the three oldest children left for school. When J.R. came home from school that day, C.W. asked her about a "bunch of junk food" she had. J.R. told her, "Snackman gave me the money." J.R. explained that he had said to tell her mother that she had lied about what appellant had done because she was scared. C.W. started to cry and called 911.

The police arrived and took C.W. and J.R. to the police station where they each gave a statement, and J.R. was later examined at a hospital. C.W. subsequently asked appellant to leave the house, which he did, although he returned several times to retrieve his belongings.

Detective Hansen testified that on May 15, 2012, nine days after the alleged abuse, he called appellant and asked him to come to the station to give a statement, which he did. After waiving his *Miranda* rights, appellant denied sexually abusing J.R. and said he was unaware that J.R. had come into the bathroom while he was taking a shower. According to Detective Hansen, appellant admitted that he gave J.R. money later that night but said it was for her to tell the truth, which was that he did not ask her to perform fellatio on him. Detective Hansen testified that although the interview with appellant had been audiotaped and videotaped, those tapes had since been lost. The detective testified from notes he had entered in the police computer system about half an hour after the interview.

Appellant testified in his defense. He testified that when C.W. came home after work on May 6, he let her into the house and after, they shared a beer, talked for about 20 minutes, and played several video games. During this time, the three oldest children came downstairs to greet C.W., after which they were told to go upstairs and go to bed. He did not remember asking C.W. for sex.

At some point, appellant told C.W. that he was going to take a shower upstairs. When he went upstairs, the children were still up, and he told them to go to bed. He was in the shower for about 10 minutes when he heard C.W. yell, "What are you doing in here?" He opened the shower curtain and saw both C.W. and J.R. J.R. was telling her mother that he had asked her to perform fellatio on him, and when C.W. asked appellant if this was true, he said, "No." C.W. and J.R. then left the bathroom.

Appellant "finished washing up" and then "hurried" to get dressed and went downstairs where he joined C.W. and J.R. in a conversation. He and C.W. then played

some video games, he slept on the couch in the living room, and later that morning, he got up and went to work. Before he left, he gave J.R. and her brothers one dollar each to buy snacks, as he often did. Appellant testified that when he spoke to the detective, he told the detective that he gave each of the three oldest children money that morning, and that he did not give J.R. money for a specific reason.

Later that day, C.W. called him and told him not to return to the house. About a week later, he went back to the house to collect his belongings, and J.R. hugged him and acted like nothing had happened. Appellant denied sexually abusing J.R.

DISCUSSION

I.

Citing *Bohnert v. State*, 312 Md. 266, 277 (1988), appellant argues on appeal that the circuit court committed reversible error when it permitted the State, over objection, to elicit testimony from C.W. that she believed J.R.'s allegations. The State responds that appellant has not preserved this argument for our review because he did not object to similarly admitted testimony from C.W. The State argues that even if preserved, the challenged testimony was admissible under the "opening the door" doctrine based on remarks defense counsel made in opening statement. Moreover, even if preserved and not admissible under the opening the door doctrine, any error in admitting the challenged testimony was harmless.

A. Challenged testimony

During the direct examination of C.W., the State elicited, over defense counsel's objection, the following testimony:

[THE STATE:] Did you initially believe [J.R.], what she told you?

[THE WITNESS:] Initially, I didn't know what to believe. I didn't – I was switching back and forth between what both of them were saying initially, but when I sat down and actually, you know, listened to what –

[DEFENSE COUNSEL]: Objection, Your Honor.

THE WITNESS: Okay.

THE COURT: Overruled.

[THE STATE:] You can answer.

THE COURT: You may answer the question.

THE WITNESS: When I sat down and actually listened to what everybody had to say and listened to what my child had to say, what she's saying, she knows too much for something not to have gone on with someone.

(Emphasis added.) A few transcript pages later, the following testimony was elicited:

[THE STATE:] Do you believe your daughter today?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled. When you say "today," she's been in the hallway. Do you want to rephrase that question?

[THE STATE:] Do you believe your daughter now?

[THE WITNESS:] Yes.

(Emphasis added.)

B. Preservation

The State argues that because appellant did not object to similarly admitted testimony between the above two exchanges, appellant did not preserve for our review his argument to the challenged testimony. The State directs our attention to the following

unobjected to testimony from C.W. about what she told defense counsel shortly after the abuse.

> [THE STATE:] And do you remember what [your] statement [to the defense attorney] was?
>
> [THE WITNESS:] Yes.
>
> [THE STATE:] What was that statement?
>
> [THE WITNESS:] That I didn't know what to believe, I was confused. I didn't believe that my child would hold this from me. My child is usually outgoing and, you know, she usually tells everything. She doesn't hold secrets, so I didn't expect her not to tell me something like this. Something like this you would expect, you know, your child to come [and] tell you. Like, when she's being bribed and, you know, being told that she's going to get [in]to trouble. If she tells, she's going to be in just as much trouble as you are. You know, she's scared. I didn't take that into consideration at all. I didn't know she was being bribed[.]

C.W. then testified that she gave "the same statement" to the social worker at the Baltimore Child Abuse Center.

The State argues that the unobjected to testimony by C.W. was an explanation about how she "came to believe J.R.'s sexual assault accusation[,]" which is the same as the objected to testimony. Not surprisingly, appellant disagrees. Appellant argues that the objected to testimony consists of two instances in which C.W. was allowed "to explicitly testify that she believed her daughter" while the unobjected to testimony "merely describes [C.W.'s] confusion and uncertainty about the situation" and "does not include a statement about whether [C.W.] actually came to believe her daughter." We agree with appellant's characterization of the testimony.

It is long established that a party waives their objection to challenged evidence if the party does not object to the same or similar evidence admitted at another point at trial. *See* Md. Rule 4-323(a) (objection to the admission of evidence is waived absent a contemporaneous objection) and *DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection."). We are unpersuaded by the State's argument that the unobjected to testimony was the same as the objected to testimony. As appellant points out, in the unobjected to testimony C.W. did not state that she believed her daughter was telling the truth, unlike the objected to testimony. Accordingly, we are satisfied that appellant has preserved his argument to the challenged testimony for our review.

C. Opening the door doctrine

The State argues that even if the challenged testimony is preserved for our review, defense counsel's remarks in opening statement that C.W. believed her daughter's sexual assault allegation were sufficient to trigger the "opening the door" doctrine. We agree with appellant that the State overstates, as it did in its preservation argument above, what was said in opening statement.

The opening the door doctrine, which is based on principles of fairness, allows a party in limited circumstances the right to introduce otherwise irrelevant evidence in response to either admissible evidence or inadmissible evidence admitted over objection. *Conyers v. State*, 345 Md. 525, 545 (1997). *See Clark v. State*, 332 Md. 77, 85 (1993) ("Generally, 'opening the door' is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence

on the same issue."). This doctrine applies to remarks made in opening statement. *State v. Heath*, 464 Md. 445, 461 (2019) ("[A] comment in opening may 'open the door' to evidence offered by the opposing party that previously would have been irrelevant, but has become relevant."). The response, however, must be proportionate. *Id.*

The State directs us to the following remarks appellant's trial attorney made during opening statement:

> [DEFENSE COUNSEL]: What [C.W.] said in her interview with the Child Abuse Center, what [C.W.] said in an interview with me that if – you might get to hear today is that she was walking up the steps. She knew [appellant] was in the shower. [Appellant] and her were dating. She knew [appellant] was in the shower. She was walking up the stairs and she sees her daughter walk into the bathroom.
>
> It seems that – in her mind, it's odd. Why is she going into the bathroom when she knows her boyfriend is in the shower? So she follows her daughter into the bathroom. As she walks in, she sees her daughter walk over to the shower, open the curtain and start staring at my client who is showering. [C.W.] starts yelling at her daughter. "What the heck are you doing? What the heck are you doing?"
>
> Ms. – I mean, the young lady, [J.R.], the daughter, then says, "Um-um," knowing she had been caught looking at him. Says, "He made me. He asked me do it. He asked me to give him a blow job." The mother never saw that. She was in the bathroom the whole time. She watched her daughter walk into the bathroom, she watched her daughter walk up to the shower, she watched her daughter pull back the curtain and she watched nothing, meaning nothing happened.
>
> Now, unfortunately, we all know, if you have children, we all were children at one point, children sometimes mislead. They sometimes don't tell the truth. They sometimes tell bigger stories than there really are and [J.R.], the daughter, told a story because she had been busted. She was caught looking at him.
>
> And specifically in the statement that [C.W.] gave to me that is on tape, she specifically says my client wasn't even looking. My client didn't even know [J.R.] was in the bathroom with her. He was just as shocked as

> [C.W.] was at what she was doing. He had his back turned towards him [sic] and he was washing himself. She saw that. But [J.R.] told a story to try to get out of trouble and she's continued to that story to this day.

The State characterizes defense counsel's opening statement regarding the content of C.W.'s pretrial statements to a social worker and defense attorney, as C.W. expressing doubt about J.R.'s credibility and that C.W. did not believe her daughter. Thus, according to the State, C.W.'s later testimony, to which appellant objected, was in response and in proportion to defense counsel's opening statement.

Appellant disagrees with the State's characterization of defense counsel's remarks in opening statement, as do we. What defense counsel said in opening statement concerned C.W.'s statements to a social worker and defense counsel regarding her *factual observations* about the night in question. Defense counsel's remarks in opening statement were simply a presentation of facts as described by C.W. and how they might conflict with facts as described by J.R. At no time did defense counsel state or insinuate that C.W. came to believe her daughter's accusations. Accordingly, because defense counsel's statements in opening did not address C.W.'s belief as to J.R.'s credibility, the opening the door doctrine is not applicable.

D. Mother's testimony that she believed her daughter

It is a fundamental principle that it is "error for [a trial] court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying." *Bohnert*, 312 Md. at 277. In *Bohnert*, a social worker, who was admitted as an expert in the field of child sexual abuse, opined that the victim "was, in fact

a victim of sexual abuse." *Id.* at 270-71. The Supreme Court of Maryland[3] stated that "[i]t 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." *Id*. at 278. The Maryland Supreme Court held that the trial court had erred as a matter of law in admitting the testimony and reversed. *Id*. at 279. The Court explained:

> The opinion of [the social worker] that [child] in fact was sexually abused was tantamount to a declaration by her that the child was telling the truth and that Bohnert was lying. In the circumstances here, the opinion could only be reached if the child's testimony were believed and Bohnert's testimony disbelieved. The import of the opinion was clear—[child] was credible and Bohnert was not. Also, the opinion could only be reached by a resolution of contested facts—[child]'s allegations and Bohnert's denials. Thus, the opinion was inadmissible as a matter of law because it invaded the province of the jury in two ways. It encroached on the jury's function to judge the credibility of the witnesses and weigh their testimony and on the jury's function to resolve contested facts. Inasmuch as the opinion was inadmissible as a matter of law, it was beyond the range of an exercise of discretion. In ruling on a question of law a judge is either right or wrong, and discretion plays no part. In this case he was wrong.

Id. at 278-79. *See also Hunter v. State*, 397 Md. 580, 589 (2007) ("[I]t is the well[-]established law of this State that issues of credibility and the appropriate weight to give to a witness's testimony are for the jury and it is impermissible, as a matter of law, for a witness to give an opinion on the credibility of another witness.").

The trial court erred in allowing the State to elicit, and C.W. to testify, that she believed J.R. was telling the truth. The State argues that if there was error, the error was harmless. Appellant disagrees, as do we.

[3] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

E. Error was not harmless

In Maryland, harmless error is governed by a single standard that was first adopted by the Supreme Court of Maryland in *Dorsey v. State*, 276 Md. 638, 659 (1976).

> "[W]hen an appellant, in a criminal case, establishes error, 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, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded — may have contributed to the rendition of the guilty verdict."

Smith v. State, 423 Md. 573, 598 (2011) (quoting *Dorsey*, 276 Md. at 659).

The case came down to whether the jury believed J.R. or whether they believed appellant. J.R.'s credibility was crucial to the jury's task of determining whether the alleged sexual assault occurred, there being no physical evidence. Under the circumstances presented here, we are unable to say that C.W.'s testimony that she believed her daughter was telling the truth in no way contributed to the verdict.

The State argues that any error was harmless for two reasons. First, the State argues that the testimony was harmless because C.W.'s later unobjected to testimony, as set forth above, diminished any harm from the objected to testimony. As we discussed, however, the unobjected to testimony does not intimate that C.W. believed her daughter. Accordingly, the unobjected to testimony in no way diminished the harm caused by the objected to testimony. Second, the State argues that because the jury acquitted appellant of five other counts (second-, third-, fourth-degree sexual offense, second-degree assault, and perverse or unnatural sexual practice), the jury "meaningfully scrutinized J.R.'s testimony and credibility, despite [C.W.]'s testimony." We find this argument

unpersuasive. Instead, we find persuasive appellant's argument that the acquittals indicate that the State's case against appellant was not strong. Accordingly, we shall reverse appellant's conviction.

II.

Appellant asserts a second argument for reversing his convictions – that his trial counsel rendered ineffective assistance of counsel by failing to object to the allegedly legally inconsistent verdict. Because we are reversing appellant's conviction on the first argument raised, we shall not address his second argument.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED.

COSTS TO BE PAID BY MAYOR AND COUNTY COUNCIL OF BALTIMORE CITY.