Circuit Court for Baltimore City
Case No. 118312005

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1383

September Term, 2022

ANTHONY FORD

v.

STATE OF MARYLAND

Leahy,
Albright,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 8, 2024

* This is an unreported opinion. The 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).

Anthony Ford ("Appellant") was convicted in the Circuit Court for Baltimore City of first-degree child abuse resulting in death under Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR"), § 3-601(b); and first-degree assault under CR § 3-202; following the tragic death of his infant daughter, B.F.,[1] in October 2018. As supported by the evidence at trial, B.F. died as a result of multiple injuries to her head that were consistent with blunt force trauma, and Appellant was the last person to be left alone with B.F. As discussed in further detail below, Mr. Ford's grandmother and 10-year-old cousin ("Cousin") may have also briefly been alone with B.F. shortly before her death.

The State's case relied, in substantial part, on the testimony of Dr. Zabiullah Ali, an assistant medical examiner for the State of Maryland recognized by the court as an expert in forensic pathology, to establish the severity of B.F.'s injuries and the cause and manner of her death. Appellant objected to a question, posed by the State, that asked Dr. Ali whether B.F.'s "injuries . . . could . . . have been caused by a nine or a 10-year-old child[.]" According to Appellant's counsel, the question called for "an incredible amount of speculation." The court overruled the objection, and Dr. Ali answered that "[i]t would be very unlikely." If credited by the jury, this answer had the practical effect of discounting Cousin as an alternative suspect.

Separately, the court sustained an objection by the State that had the effect of disallowing Appellant from impeaching Dr. Ali based on an announced, but still forming,

[1] Md. Rule 8-125(b)(1) (mandating use of minor victim's initials in documents pertaining to a criminal appeal that are generally available to the public).

investigation by the Maryland Attorney General into the Office of the Chief Medical Examiner. The investigation was announced following controversial testimony by then-Chief Medical Examiner David Fowler in Minnesota during the trial of Derek Chauvin, who murdered George Floyd.

Appellant presents two questions for review on appeal, which we re-order as follows:

> 1. "Did the trial court abuse its discretion in permitting the State medical examiner to offer conclusions excluding possible suspects without a sufficient factual basis?"
>
> 2. "Did the trial court erroneously prohibit cross-examination of the State medical examiner regarding pro-police biases of the Office of the Chief Medical Examiner?"

For the reasons stated below, we hold that the trial court abused its discretion in overruling Appellant's objection to the State's question which called for Dr. Ali to speculate, without a sufficient factual foundation under Maryland Rule 5-702(3), as to the ability of a nine or 10-year-old child to cause B.F.'s injuries. Because the court's error was not harmless, we must reverse Appellant's convictions on this ground. Therefore, we do not reach the merits of the second question presented, since doing so would require us to unnecessarily decide constitutional issues under the Confrontation Clause of the federal Constitution and Article 21 of the Maryland Declaration of Rights. *Blake v. State*, 485 Md. 265, 305 (2023) ("It is 'this Court's well-established policy to decide constitutional issues only when necessary[.]'" (alteration in original) (quoting *Robinson v. State*, 404 Md. 208, 217 (2008)).

BACKGROUND

This case arises from the death of Appellant's daughter, B.F., who died when she was just shy of six months old from injuries sustained while in Appellant's care in October 2018. Following B.F.'s death, Appellant was indicted and charged in the Circuit Court for Baltimore City with second-degree murder, first-degree child abuse resulting in death, and first-degree assault.

A three-day jury trial commenced on August 16, 2022. The parties on appeal agree that the following excerpt from Appellant's opening brief represents, in pertinent part, a general depiction of the events, as supported by the evidence adduced at trial, surrounding B.F.'s tragic death:

> [On October 4, 2018] Mr. Ford returned [home] from working around 7:00am. When Ms. Andrews, [B.F.'s mother,] left for work around that same time, [B.F.] was asleep and there was nothing unusual about her appearance. By 8:00am the other adults had left for work and the children had gone to school, leaving Mr. Ford and [B.F.] alone in the home. Mr. Ford gave [B.F.] a bath, got her dressed, and waited for his grandmother Ms. Geralis Simmons to pick them up and take them to the market. Ms. Simmons arrived around 1:40pm to pick up Mr. Ford and [B.F.]. Ms. Andrews had the couple's Independence Card with her at work, so Ms. Simmons first had to drive Mr. Ford and [B.F.] to the hospital to get the card. Mr. Ford placed [B.F.] in the back of the car in her car seat, and [Mr. Ford] sat in the front passenger seat. Mr. Ford's ten-year-old cousin [("Cousin")] . . . sat in the back seat.
>
> When they arrived at the hospital, Mr. Ford went into the hospital to find Ms. Andrews because neither of their cell phones were working. Mr. Ford was inside of the hospital for approximately twenty to thirty minutes looking for Ms. Andrews but was unable to find her. While Mr. Ford was in the hospital, Ms. Simmons, [Cousin], and [B.F.] waited in the car. [B.F.] was crying, apparently due to the heat, and [Cousin] handed the baby to Ms. Simmons. While feeding [B.F.] a bottle, Ms. Simmons noticed a mosquito bite on her forehead. When Mr. Ford returned Ms. Simmons drove the four of them back [home].

> When they arrived at the house, Ms. Simmons told Mr. Ford to go inside and get a rag because [B.F.]'s car seat had left gum on the backseat of her car. Mr. Ford went inside with [Cousin] and [B.F.] Mr. Ford put [B.F.] in a bassinet in the living room, got the rag, and told [Cousin] to take it outside to Ms. Simmons. [Cousin] came back inside, saying he had to use the restroom. [B.F.] was awake and Mr. Ford moved her to the bedroom into her bigger bassinet, but when he tried to give her a pacifier she rejected it, started crying abnormally and gasping for air, and went limp. [B.F.]'s nose was bleeding, and Mr. Ford told [Cousin] to get a phone to call 911.
>
> Mr. Ford called the paramedics and told them his baby was not breathing and blood was coming from her nose. When the paramedics arrived, [B.F.] was not breathing and had no pulse, and the paramedics performed CPR until they reached the hospital. The paramedics noted the blood from [B.F.]'s nose and some bruising on her face. [B.F.] was admitted to the pediatric intensive care unit and placed on full life support. She was declared brain dead and ultimately removed from life support two days later.

During the course of the trial, the State called eight witnesses, including Dr. Zabiullah Ali, an assistant medical examiner for the State of Maryland who was admitted as an expert in forensic pathology. Dr. Ali's testimony is the focus of the dispositive issue in this appeal. The State also called Dr. Adiran Holloway, a pediatric intensivist at the University of Maryland, who was admitted as an expert in pediatric critical care and pediatrics. Appellant called Dr. Jane Turner, who was admitted as an expert in pathology and forensic pathology. Our discussion includes excerpts from the testimony presented by these experts.

In addition to Dr. Ali, the State called Courtney Andrews, mother of B.F.; Davetta Parker, B.F.'s great grandmother; Hazel Wilson, B.F.'s grandmother; Geralis Simmons, who helped raise Appellant and who, according to Appellant's brief, is Appellant's grandmother; Shelby Litz, a crime scene technician with the Howard County Police

Department who, at the time of the events at issue in this case, worked as a crime laboratory technician for the Baltimore City Police Department; and Lambert Martin, a paramedic for the Baltimore City Fire Department. None of these witnesses testified to who or what caused B.F.'s injuries, and no witness testified to seeing Appellant harm B.F. anytime in the past.

In his defense, Appellant waived his right to remain silent and testified. Appellant testified that B.F. did not fall off the bed and he denied ever shaking, hitting, or harming B.F.

Ultimately, Appellant was convicted on the child abuse and assault charges. The jury acquitted Appellant of the murder charge. Appellant noted a timely appeal to this Court. Additional facts are provided below.

I.

Maryland Rule 5-702

A. Additional Background

Appellant contends that the trial court "abused its discretion in permitting [Dr. Ali] to offer conclusions excluding possible suspects without a sufficient factual basis." (Emphasis removed). The relevant background that underlies Appellant's claim of error is as follows.

At trial, Dr. Ali was recognized as an expert in forensic pathology, a field that he described as "a branch of what is a sub-specialty of pathology mainly involved with identification and interpretation of human injuries." In the course of his testimony on

direct, the State elicited testimony concerning Dr. Ali's autopsy of B.F. and the nature and cause of her injuries.[2] Dr. Ali testified that, in the course of the autopsy, he observed "multiple bruises, lacerations to [B.F.'s] skin . . . head injuries to the face, injuries to the back and on the buttocks and lower extremities." As to injuries to B.F's head, Dr. Ali stated he "observed 13 areas of distinct injuries."

Examination of B.F's internal organs did not reveal "any evidence of any disease processes or any injuries"; "[t]here was no bleeding in the belly[, t]here was no bleeding in the chest cavity[, b]asically it was unremarkable." However, examination of B.F's brain revealed "so-called subdural and subarachnoid hemorrhage[.]" The State asked Dr. Ali to explain the nature and cause of these injuries:

> Q. Okay. So when the brain was examined what findings were made?
>
> A. [B.F.'s] brain showed evidence of brain death. Basically she also had the so-called subdural and the subarachnoid hemorrhage and she had evidence of herniation.
>
> So any time a person has injuries to the head their brain sort of swells and that caused the brain to be pushed downward because the skull is sort of rigid and there is not enough space for the brain to expand.
>
> It pushes the brain downward and it's basically crushed against the bony structures which causes then all major centers which recognize the breathing, heartbeat, and all bodily functions to cease.
>
> * * *
>
> Q. . . . I want to . . . talk specifically about the head injury. In the injuries that you observed to [B.F.] can you say anything about the mechanism about how those injuries were caused?
>
> A. The injuries I observed externally describe many areas of bruises on the scalp from outside, inside I also, five areas of distinct separate areas of bleeding . . . .

[2] The "authorized autopsy report" authored by Dr. Ali following his autopsy of B.F. was admitted into evidence as State's Exhibit 3.

> **Those injuries are . . . consistent with blunt force trauma**. Those injuries were very distinct, separate from each other. It's not like a diffused or sheet-like bleeding. Those are different areas of impact.
>
> Again, **blunt force trauma is when you hit a person either with a blunt object, that could be a fist, kick, baseball bat or something in that nature, or part of the body is struck against a hard surface**.

(Emphasis added). Dr. Ali discussed the symptoms that he would expect an infant like B.F. to experience and stated that, in his opinion, an infant like B.F. would begin to develop "symptoms . . . very rapidly within minutes"; Dr. Ali also appeared to indicate that death could occur within mere minutes.[3] Previously, another witness for the State, Dr. Adrian Holloway,[4] testified that an infant with B.F.'s injuries would exhibit symptoms anywhere from "minutes" to "three to four hours" after the abuse.

The prosecutor turned Dr. Ali's attention to the cause and manner of death:

> Q. . . . Do you have an opinion to a degree of medical certainty as to the cause and manner of the death of [B.F.]?
>
> A. Yes, I do.

[3] At one point in the transcript, the State asked Dr. Ali: "You indicated that the symptoms that you saw would indicate a wrath [sic] of death within minutes, is that what your testimony was?" Dr. Ali responded, "That was my testimony, yes, sir." While the transcript is ambiguous as to what exactly the State asked Dr. Ali, the testimony appears to indicate that, in Dr. Ali's view, the injuries inflicted upon B.F. could cause death within minutes.

[4] Dr. Holloway was recognized as an expert in pediatric critical care and pediatrics in the State of Maryland. Dr. Holloway explained that, after considering a differential diagnosis, she and her fellow doctors in the emergency department "settled on the diagnosis of abusive head trauma or non-accidental trauma . . . or what we call Shaken Baby Syndrome . . [a]nd that comes from a compendium of the evidence both in the findings from the head CT, from the bruising that we saw on [B.F.'s] face, from the rib fractures, and from the retinal hemorrhages that were demonstrated and evaluated by our pediatric ophthalmologist."

Q. And what is that opinion?

A. The cause of death was head and neck injuries. . . . The manner of death was homicide.

Q. Okay. Which of the child's injuries would have caused her death?

A. Well the brain injuries causes the breathing. She had subdural/subarachnoid hemorrhage [in which] the vessels of the brain sort of narrow[] down and shut[] off all the blood circulation and the tissue of the brain is basically dead.

When [B.F.] was admitted to the hospital basically she didn't have any reflexes. . . . which is . . . consistent with impending brain death.

Q. Okay. . . . [**I**]**s there any other way that [the injuries] would have been caused other than blunt force trauma**?

A. **Not in a 5-month-old child, no**.

Q. Okay. Could illness have caused them? . . .

A. Not in my opinion, no.

Q. Okay. **Could a nine or a 10-year-old child have caused the injuries that you observed**?

(Emphasis added). Appellant's counsel promptly objected before Dr. Ali could respond; the circuit court overruled counsel's objection during the following bench conference:

[APPELLANT'S COUNSEL]: I believe that calls for an incredible amount of speculation.

[THE STATE]: The doctor is an expert in pathology and forensic pathology as far as cause and manner of death, cause of injury, and the injuries themselves. This is no different than asking if illness caused it.

THE COURT: I will allow it. . . . Objection is overruled.

The State resumed its line of inquiry:

Q. The injuries you observed could they have been caused by a nine or a 10-year-old child?

A. **It would be very unlikely**.

Q. I'm sorry?

A. **It would be very unlikely, yes.**

On cross-examination, Appellant's counsel sought to challenge Dr. Ali's statements in the following exchange:

Q. Dr. Ali, how strong is a nine to 10-year-old male?

A. Well it depends on the individual, you know.

Q. Okay. So you . . . don't know how strong -- How much can a nine or a 10-year-old male[] . . . bench press?

A. Not much.

Q. Okay. Could a nine -- Do you know some sort of weight or a range?

A. No, I don't.

Q. What about a nine or 10-year-old female, how strong are they?

A. Usually they don't have enough strength compared to a male.

* * *

Q. Okay. But this is a baby in this instance, right?

A. Yes.

Q. So you have no idea without seeing the nine or 10-year-old child whether a nine or a 10-year-old child could do something like this, am I right?

A. My answer was unlikely.

Dr. Jane Turner testified on behalf of Appellant. Dr. Turner offered alternative explanations to those offered by Dr. Ali and the hospital physicians, opining that B.F. had diabetic ketoacidosis, hemorrhagic pneumonia, sepsis, and disseminated intravascular coagulation ("DIC"). She explained, for example, that sepsis and DIC can cause "spontaneous bleeding in the skin or you can have easy bruising of the skin because your platelets aren't working properly[.]" This bleeding, she said, could explain the appearance of B.F.'s bruises. Dr. Turner explained that sepsis is "a very serious condition that often leads to death[; s]epsis causes the different organs in your body to shut down" including the brain.

Following the close of all the evidence, the State emphasized, in closing arguments, its view that Appellant was the only individual who had the opportunity to cause the injuries sustained by B.F.:

> [S]omebody killed her by beating her small body.
>
> Dr. Holloway and Dr. Ali have told you that as a result of her injuries [B.F.] would have become fussy, would have become lethargic. And it would have happened anywhere between minutes after the injury was inflicted to four hours. Who was she with?`
>
> ([The prosecutor] points to [Appellant].)
>
> **She was left in the sole care and custody of** [**Appellant**].
>
> There was a time period where [Appellant] got into a car with his grandmother and his cousin, I believe 9 years-old at the time, and drove to the hospital to [B.F.'s m]other.
>
> And [Appellant's grandmother] testified [that B.F.] was fussy, she got her out of the car seat, gave her, her bottle. But nothing happened in the car. [Appellant] got back into the car, they drove back home, and the [Appellant] went back in the house with the baby. **He was the only one who was alone with** [**B.F.**] **all day**. **After she was left in his care**.
>
> [Dr. Ali] and Dr. Holloway both talked . . . about the mechanism of how her injury occurred. She had multiple impact points on her head alone, which would suggest multiple blows. The blows could have caused her brain

> to rock in her head and would have caused the bleeding that eventually killed her.
> …
> [**Appellant**] **caused** [**B.F.'s**] **death. He was the only one with her during the relevant time period who would have had the opportunity to cause the injuries that caused her death.**

In response, Appellant's counsel argued, among other things, that Appellant's grandmother or perhaps the 10-year-old cousin could have caused B.F.'s injuries: "[The 10-year-old cousin] is with [Appellant's grandmother] in the car. [The cousin] is also in the house with [Appellant]. [The cousin] goes in the house with [Appellant] to get the rag. He is right there too."

B. Parties' Contentions

Appellant contends the trial court abused its discretion by overruling Appellant's objection and permitting Dr. Ali to opine as to the ability of a 10-year-old child (the same age as Cousin) to inflict the injuries that caused B.F.'s death. More specifically, Appellant asserts that the State did not satisfy Maryland Rule 5-702(3), which instructs trial courts to consider, in making a decision as to the admissibility of expert testimony, whether "a sufficient factual basis exists to support the expert testimony." Citing to *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020), Appellant notes that, for testimony to have a sufficient factual basis, there must be both an "adequate supply of data" and "a reliable methodology" to support the testimony. In Appellant's view, the State (and Dr. Ali) failed to proffer sufficient data to support his testimony, and, therefore, the testimony constitutes impermissible "*speculation*[.]" (Citing *Giant Foods, Inc. v. Booker*, 152 Md. App. 166, 183 (2003) (emphasis supplied by Appellant's brief). This is because, as argued by

Appellant, "[t]he single fact that a hypothetical person is an adolescent does not provide a sufficient factual basis from which an expert could conclude that they could or could not cause physical injuries to a five-month-old infant." While Dr. Ali testified, at length, about B.F.'s injuries and likely symptoms, "[t]he issue[] . . . is that Dr. Ali's testimony does nothing to exclude children from being able to, for example, wield a baseball bat or hit the baby against an object[.]" Appellant continues, stating that "Dr. Ali was not qualified as a force expert" and "[t]here was no basis to conclude that he had an expertise on amounts of force used by children."

Appellant emphasizes that, at trial, neither Dr. Ali nor any other witness described the height, weight, or strength of the children, including Cousin, who may have been left alone with B.F. prior to her death. Appellant also observes that the testimony did not establish that "a more severe degree of force" than a child could exert "would be necessary to cause [B.F.'s] injuries[,]" or that "a child could not have shaken [B.F.] and hit her head," and therefore Dr. Ali's statements were "speculative and tenuous." At bottom, Appellant argues that the testimony amounted to "general conclusions about a class" that, in Appellant's view, "cannot provide a sufficient factual basis for expert testimony." The court's error was not harmless, Appellant states, because it "undermined [Appellant's] ability to argue" that Cousin or another child was "responsible for [B.F.'s] injuries."

The State, initially, contends that Appellant's objection was insufficient to preserve any issue concerning the "science undergirding Dr. Ali's testimony" under *Rochkind*. (Citing *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997)). The State asserts that

Appellant waived the issue because an objection that a question calls for "speculation" is distinct from a challenge to the admission of a "novel scientific technique[] or principle[.]" (Citing *Rochkind*, 471 Md. at 22).

Moving on, the State emphasizes that Dr. Ali testified only that it was "very unlikely" a child could inflict B.F.'s injuries, *not* that doing so was impossible. The testimony was not impermissible speculation, the State says, because Dr. Ali had described B.F.'s injuries with "granular" detail and described blunt force trauma as "when you hit a person either with a blunt object, that could be a fist, kick, baseball bat or something in that nature, or part of the body is struck against a hard surface." The State construes this testimony as indicating that "a significant amount of force" was necessary to inflict B.F.'s injuries. Accordingly the State distinguishes this case from *Hamilton v. Kirson*, 439 Md. 501, 544 (2014), relied on by Appellant, where the Supreme Court determined an expert in a negligence case had impermissibly "reached the conclusion that the house contained lead-based paint" based solely "on a presumption that houses built during a certain time period contain typically lead-based paint." Unlike the presumption at-issue in *Kirson*, here, the State says "Dr. Ali testified about [B.F.'s] specific, actual injuries, and compared them to the types of blows that cause them, and how the injuries cause the symptoms, death included, suffered by [B.F.]"

C. Standard of Review and Applicable Law

As stated by our Supreme Court in *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296 (2023):

> After *Rochkind* [*v. Stevenson*, 471 Md. 1 (2020)], this Court reviews a trial court's decision to admit or exclude expert opinion for an abuse of discretion. This Court has described an abuse of discretion as occurring "where no reasonable person would take the view adopted by the trial court[,]" *Md. Bd. of Physicians v. Geier*, 451 Md. 526, 544, 154 A.3d 1211, 1221 (2017) (cleaned up), or when "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable[,]" *Wilson v. John Crane, Inc.*, 385 Md. 185, 199, 867 A.2d 1077 (2005) (cleaned up).

Oglesby, 484 Md. at 327 (alterations in original). *See also State v. Matthews*, 479 Md. 278, 306 ("[A] trial court's ruling to admit or to exclude expert testimony 'will seldom constitute a ground for reversal.'" (quoting *Rochkind*, 471 Md. at 10)); *see also_Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 405 (2023) (Booth, J. concurring) (suggesting that the Supreme Court of Maryland re-formulate the abuse-of-discretion standard in the context of appellate review of a trial court's application of the *Daubert-Rochkind* factors because, among other reasons, in such cases "our abuse of discretion standard of review involves a searching and careful examination of the record, data, studies, testimony, and trial court's analysis of the same").

In *State v. Matthews*, 479 Md. 278 (2022), the Court explained the impact of *Rochkind* on how Maryland courts evaluate the admissibility of expert testimony:

> In *Rochkind*, we abrogated the *Frye-Reed*[5] general acceptance test and adopted *Daubert*.[6] In so doing, we explained that "[a]dopting *Daubert* eliminates the duplicative analysis" that courts previously were required to undertake and instead "permits trial courts to evaluate all expert testimony – scientific or otherwise – under Rule 5-702." *Rochkind*, 471 Md. at 35, 236 A.3d 630 (emphasis in original). Thus, after *Rochkind*, Rule 5-702 is the touchstone when determining the admissibility of expert testimony.

Matthews, 479 Md. at 310. *See also Rochkind*, 471 Md. at 36 (noting *Daubert* applies "to *all* expert testimony" and that "*Daubert*'s general holding [] applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge (citation and quotation omitted)).

The *Oglesby* Court set out the law governing the admissibility of expert testimony and explained the considerations that are appropriate under the third factor of Maryland Rule 5-702:

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[5] In a footnote, the *Matthews* Court explained:

> "*Frye*" came from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), in which the D.C. Circuit announced a then-new evidentiary standard by which the admissibility of expert testimony involving a scientific principle or discovery turned on the "general acceptance" of such evidence "in the particular field in which it belongs." "*Reed*" came from *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978), in which this Court adopted the *Frye* standard for use in Maryland courts. After *Reed*, the rule in Maryland for the next 42 years was that, "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field." *Id.* at 381, 391 A.2d 364.

State v. Matthews, 479 Md. 278, 289 n.7 (2022). The Supreme Court of Maryland "abrogate[ed] the *Fry-Reed* standard" in *Rochkind v. Stevenson*, 471 Md. 1 (2020). *Id.*

[6] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

> Maryland Rule 5-702 provides that "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." In making that determination, the trial court must determine: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. R. 5-702 (paragraph breaks omitted).
>
> The third factor, the existence of a sufficient factual basis, has been interpreted as encompassing two sub-factors—whether the expert had an adequate supply of data and whether the expert used a methodology that was reliable. *See Sugarman v. Liles*, 460 Md. 396, 415, 190 A.3d 344, 354 (2018); *Rochkind*, 471 Md. at 22, 236 A.3d at 642. Absent either sub-factor, an expert's opinion is inadmissible. *See Rochkind*, 471 Md. at 22, 236 A.3d at 642. We have held that, to satisfy the requirement of a reliable methodology, "an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data and must have an adequate theory or rational explanation of how the factual data led to the expert's conclusion." *Sugarman*, 460 Md. at 415, 190 A.3d at 355 (citation omitted).
>
> In addition, in determining whether an expert has a sufficient factual basis to offer an opinion, a court may consider whether there is too great an analytical gap between the data relied upon and the opinion proffered. *See Rochkind*[,] 454 Md. [at] 289, 164 A.3d [at] 261[.] The data or information upon which an expert relies must provide factual support for the opinions reached. *See Sugarman*, 460 Md. at 427, 190 A.3d at 362 ("To bridge the analytical gap, an expert's testimony must have a sufficient factual foundation. It is permissible for an expert to reasonably extrapolate from existing data provided that a sufficient factual basis for that opinion exists." (Citations omitted)). But testimony may not be the *ipse dixit* conclusion of the expert. *See id.* at 415, 190 A.3d at 355 ("Conclusory or *ipse dixit* assertions are not helpful—an expert must be able to articulate a reliable methodology for how [the expert] reached [the] conclusion." (Cleaned up)). Also, pursuant to Maryland Rule 5-703(a), "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed."

Oglesby, 484 Md. at 327-28 (first, sixth, seventh, and eighth alterations in original). *See also Matthews*, 479 Md. at 309 (stating that, absent either an "adequate supply of data" or

a "reliable methodology[,]" an expert's opinion is "mere speculation or conjecture" and does not satisfy Md. Rule 5-702(3) (citing *Rochkind*, 471 Md. at 22)).

"The proponent of challenged expert testimony must establish the three prongs of Rule 5-702 (including the two subfactors that make up a 'sufficient factual basis') by a preponderance of the evidence." *Matthews*, 479 Md. at 309 (citations omitted).

D. Analysis

Contrary to the State's assertions during closing arguments, the evidence adduced at trial did not clearly establish that Appellant was the only individual who had been left alone with B.F. "all day." Crucially, for the purpose of this appeal, the testimony of Appellant and Ms. Simmons did not establish whether Cousin was left alone with B.F. when the family returned home from the hospital, and Appellant fetched a rag for Cousin to bring outside to Ms. Simmons, after Appellant had placed B.F. in a bassinet. Indeed, in closing, Appellant's counsel noted that Cousin "is also in the house with [Appellant]. [Cousin] goes in the house with him to get the rag. He is right there too." A reasonable factfinder could have concluded that, at the least, there was a substantial possibility that Cousin was—even if only briefly—left alone with B.F while Appellant fetched the rag.

This matters because Dr. Ali's testimony—if credited by the jury—went far toward eliminating Cousin as a suspect by stating it was "very unlikely" that B.F.'s injuries could have been caused by a nine or a 10-year-old child. The State and Dr. Ali failed to lay any foundation for this assertion, whether through the facts adduced at trial or reference to, for example, scientific literature that may have been available. Clearly, as an expert in forensic

pathology who performed the autopsy on B.F., Dr. Ali was qualified to give (and did give) his opinion as-to the cause and manner of B.F.'s death, together with a detailed description of her injuries; however, we are unpersuaded that his expertise extended to opining about the average strength of nine and 10-year-old children, or their ability to cause the injuries sustained by B.F., *especially* given Dr. Ali's acknowledgement that B.F.'s injuries "are . . . consistent with blunt force trauma" which could be inflicted by "a fist, kick, baseball bat or something in that nature, or part of the body is struck against a hard surface."

Appellant's counsel lodged a timely objection when the State asked Dr. Ali: "Could a nine or a 10-year-old child have caused the injuries that you observed?" At the ensuing bench conference, counsel argued the question "calls for an incredible amount of speculation." Contrary to the State's argument on appeal, we believe this objection was, under the circumstances, sufficient to invoke the requirements of Maryland Rule 5-702(3). It is well established that for expert testimony to have a "sufficient factual basis" under Rule 5-702(3), two sub-factors must be satisfied—an "adequate supply of data" and a "methodology that [is] reliable." *Oglesby*, 484 Md. at 327 (citations omitted). If these sub-factors are not satisfied, expert testimony constitutes "mere *speculation* or conjecture." *Matthews*, 479 Md. at 309 (emphasis added) (citation omitted). The fact that Dr. Ali had already been recognized as an expert in forensic pathology does not did not free him from the constraints of Rule 5-702. *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 478 (2013) ("[S]imply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled

opinion, which does not otherwise comport with Md. Rule 5-702." (alteration in original) (quoting *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182-83 (2003)); *see also Giant Food*, 152 Md. App. at 182 ("Because appellants made no objection to the qualifications of Dr. Redjaee, and concede his expertise, we need focus on only the second and third factors [of Maryland Rule 5-702].").[7]

The record reveals no supply of data on which Dr. Ali could have based his assertion that it would be "very unlikely" that a nine or 10-year-old could have caused B.F.'s injuries. On appeal, the State directs us to Dr. Ali's detailed testimony describing the nature and severity of B.F.'s injuries, and her likely symptoms. Critically, however, this testimony has no bearing on the strength of the average nine or 10-year-old, nor such a child's ability to, for example, wield a blunt object or pick-up and drop an infant,[8] and the State has failed to proffer (both at trial and on appeal) any methodology by which Dr. Ali could have drawn such a conclusion. "[T]estimony may not be the *ipse dixit* conclusion of the expert." *Oglesby*, 484 Md. at 328. Accordingly, we conclude that the State *clearly* failed to satisfy

[7] We note that the discovery documents in the record give no indication that Dr. Ali may opine about the ability of a nine or 10-year-old to inflict B.F.'s injuries. We further note, however, that the State's initial disclosures state that, among other things, "[t]he substance of Dr. Ali's findings and opinions are contained in [B.F.]'s autopsy report[,]" and that, on appeal, this report is missing from the evidence envelope. In any case, it is unsurprising—absent some prior indication that Dr. Ali intended to testify that it would be "very unlikely" a child of Cousin's age could inflict B.F.'s injuries—that the record reflects that Appellant did not take the opportunity to cross-examine Dr. Ali during *voir dire* as to whether an expert qualified in forensic pathology may properly opine on such an issue.

[8] We note that, as pertains to this case, Ms. Simmons testified that Cousin interacted with B.F. in the car by "hand[ing] [B.F.] to me[,]" indicating that Cousin did, in fact, have the strength to pick up B.F.

either sub-factor under Rule 5-702(3) and, for the same reason, we hold that the trial court abused its discretion in overruling Appellant's objection.

The court's error was not harmless. As instructed by the Supreme Court in *Dorsey v. State*:

> [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.

Dorsey v. State, 276 Md. 638, 649 (1976) (footnote omitted). While Dr. Ali did not assert with *certainty* that a child of Cousin's age would be unable to cause B.F.'s injuries, his testimony—if credited by the jury—largely foreclosed the possibility. Absent Dr. Ali's contested testimony, there is a reasonable possibility that one or more jurors would have been unable to find, beyond a reasonable doubt, that Appellant was guilty of the child abuse and assault charges.

E. On the Question of Whether the Trial Court Appropriately Denied Cross-Examination of Dr. Ali

Because we reverse Appellant's convictions and remand for new trial on the ground that the court abused its discretion by admitting Dr. Ali's testimony over Appellant's objection, which was based on Maryland Rule 5-702(3), we need not reach the merits of Appellant's second question—whether, under the Confrontation Clause of the U.S. Constitution and Article 21 of the Maryland Declaration of Rights, he had the right to cross-examine Dr. Ali concerning the nascent investigation into Office of the Chief Medical

Examiner.[9] *See, e.g.*, *Blake v. State*, 485 Md. 265, 305 (2023) ("It is 'this Court's well-established policy to decide constitutional issues only when necessary[.]'" (alteration in original) (quoting *Robinson v. State*, 404 Md. 208, 217 (2008)).

We note, just for guidance on remand, that the Supreme Court of Maryland has instructed that:

> In controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5–611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. The trial court may also restrict cross-examination based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

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[9] Before the commencement of Appellant's trial, then-Maryland Attorney General, Brian Frosh, had announced the members of a "design team" that would "develop the process for reviewing in-custody death determinations made by the Office of the Chief Medical Examiner . . . during the tenure of Dr. David Fowler." According to a press release, which was marked for identification at Appellant's trial:

> In May 2021, Attorney General Frosh announced that, in consultation with Governor Hogan's Office of Legal Counsel, the Office of Attorney General would conduct an independent audit of in-custody death determinations made by OCME under Dr. Fowler. The decision to conduct the audit followed a request by hundreds of medical professionals to undertake a review of Dr. Fowler's work in the wake of his testimony in the trial of Derek Chauvin.

At Appellant's trial, the judge stated that she had recently spoken with the deputy attorney general, who affirmed that "[t]hey are at the design stage, so they are now making an assessment of what the audit will look like, it hasn't even started[.]"

Manchame-Guerra v. State, 457 Md. 300, 311 (2018) (quoting *Peterson v. State*, 444 Md. 105, 124 (2015)); *see also State v. Galicia*, 479 Md. 341, 361 (2022) (same). The *Manchame-Guerra* Court further instructed that:

> Our cases demonstrate that questioning under [Maryland] Rule 5-616(a)(4) is not to be readily prohibited when the Confrontation Clause is at issue. To the contrary,
>
> > [w]hen the trier of fact is a jury, questions permitted by Rule 5–616(a)(4) should be prohibited only if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is substantially outweighed by the danger of undue prejudice or confusion.
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> *Calloway v. State*, 414 Md. 616, 638[,] (2010) (quoting *Leeks v. State*, 110 Md. App. 543, 557–58[,] (1996)).

Manchame-Guerra, 457 Md. at 312 (second alteration in original). Assuming without deciding that it was permissible for the court in this case to limit Appellant's ability to cross-examine Dr. Ali due to the limited information available, at the time, concerning the attorney general's investigation, we caution that, on remand for a new trial, the facts on the ground may have changed.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.