Circuit Court for Wicomico County
Case No. C-22-CR-19-000081

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1476

September Term, 2023

STATE OF MARYLAND

v.

AUSTIN CHRISTOPHER WHITE

Beachley,
Albright,
Robinson, Dennis M., Jr.
(Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 12, 2024

*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).

On June 6, 2019, a Wicomico County jury convicted Austin White of sexual child abuse and three separate counts of third-degree sexual offense.[1] White later filed a petition for post-conviction relief, alleging ineffective assistance of counsel. After the Circuit Court for Wicomico County granted White's petition in part and ordered a new trial, we granted the State's application for leave to appeal.

For the reasons below, we shall affirm the decision of the post-conviction court.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2018, the Wicomico County Department of Social Services ("DSS") received a report alleging potential sexual abuse of M.N., then a minor.[2] DSS employee Katie Beran interviewed M.N. at the Child Advocacy Center ("CAC") the next day. During the interview, M.N. told Beran that White touched her in a sexual manner. Beran testified that M.N. was "very shy" and "very apprehensive" during the interview. After interviewing M.N.'s mother, ("M."),[3] Beran ascertained that White was an ex-boyfriend of M. who lived with M.N. and M.'s three other children at the time the abuse occurred.

Beran conducted a second interview of M.N. in August 2018. During this interview, M.N. reported that White touched her vagina while they were watching a movie. M.N.

[1] White was also initially convicted of second-degree rape. In a direct appeal, a panel of this Court reversed White's second-degree rape conviction, but upheld his remaining convictions and remanded the case for resentencing. *White v. State*, No. 1278, Sept. Term 2019 (filed Oct. 22, 2020).

[2] Although M.N. is now an adult, we identify her in this manner to protect her confidentiality.

[3] We identify M.N.'s mother as "M." in order to protect M.N.'s confidentiality.

also stated that she informed M. about the incident, but said that M. did not believe her. M. was interviewed the next day by Salisbury Police Detective Matthew Rockwell and admitted that M.N. had told her multiple times about White's inappropriate touching. M. was then charged with various criminal offenses related to White's abuse of M.N. After M. was charged, DSS implemented a safety plan where M.N. was placed with her biological father. M. pleaded guilty to child neglect and contributing to the condition of a child in need of assistance in March 2019, on the condition that she testify at White's trial.

Beran interviewed M.N. a third and final time in January 2019. Beran testified that, in contrast to earlier interviews, M.N. was a "different person" who was "much more comfortable in speaking" about White's conduct. During the interview, M.N. reaffirmed that White touched her while they were watching a movie, stated that he digitally penetrated her vagina in a separate incident, and said that he twice tried to force her to engage in oral sex.

White was charged with multiple sex-related offenses and was tried in June 2019. Beran testified at trial and the three interviews with M.N. were admitted into evidence. Catherine Beers, a licensed clinical social worker, was qualified as an expert in the field of child sexual abuse and testified for the State. M.N. testified to multiple incidents of sexual abuse by White. M. testified that she witnessed one incident of sexual misconduct by White and that M.N. had told her about two other incidents of inappropriate touching. During direct-examination, M.N. admitted to making up stories with her sister about M.'s boyfriends to "get them in trouble" because they "didn't like that [M.] was giving all [her]

attention to her boyfriends[.]"[4] Both M.N. and M. admitted during cross-examination that they had lied or otherwise changed their stories over the course of their previous interviews but maintained that they were telling the truth at trial.

White's defense focused on M.N.'s lack of credibility. In his testimony, White adamantly denied that there was "any inappropriate sexual or physical contact" with M.N.

White was found guilty of sexual child abuse and three separate counts of third-degree sexual offense. The jury acquitted White of two counts of second-degree rape and one count of third-degree sexual offense. Although the jury initially found White guilty of one count of second-degree rape related to fellatio, this Court reversed that conviction because his conduct occurred before 2015 and "prior to 2017, second-degree rape did not include fellatio [and] had only one modality—vaginal intercourse." *White v. State*, No. 1278, Sept. Term 2019, slip op. at 14 (filed Oct. 22, 2020). We affirmed White's remaining convictions and remanded the case for resentencing. *Id.*, slip op. at 34. White was given an executed sentence of thirty-five years.

On April 7, 2022, White filed a petition for post-conviction relief, raising nineteen allegations of ineffective assistance of counsel. A hearing was held in the Circuit Court for Wicomico County on February 1, 2023. White's trial counsel testified at the hearing.

In a written opinion, the court granted White's post-conviction petition on four grounds (the court denied all other claims of error). The court applied the two-prong test

[4] M.N. said that she or her sister would claim that one of M.'s boyfriends "hit us or something like that."

from *Strickland v. Washington*, which provides that defense counsel renders ineffective assistance when (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." 466 U.S. 668, 687 (1984). The court found that trial counsel was deficient in his cross-examination of Beran and Beers by allowing them to bolster M.N.'s credibility. The court also found that trial counsel was deficient for not objecting to evidence that White molested M.N.'s sister. The court concluded that these deficiencies were prejudicial to White and that "the result of his trial was fundamentally unfair and patently unreliable." Accordingly, the post-conviction court granted White's request for a new trial.

On October 2, 2023, we granted the State's application for leave to appeal the post-conviction judgment. Additional facts will be provided as necessary to inform our analysis.

DISCUSSION

Review of a "post-conviction court's findings regarding ineffective assistance of counsel [i]s a mixed question of law and fact. The factual findings of the post-conviction court are reviewed for clear error. The legal conclusions, however, are reviewed *de novo*." *McGhee v. State*, 482 Md. 48, 66 (2022) (quoting *Wallace v. State*, 475 Md. 639, 653 (2021)).

"The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the right to 'effective assistance of counsel.'" *Id.* (quoting *Strickland*, 466 U.S. at 686). To demonstrate an ineffective assistance of counsel claim, defendants must meet a two-prong test established

by the Supreme Court in *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

When evaluating whether trial counsel's performance was deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *State v. Davis*, 249 Md. App. 217, 222 (2021) (quoting *Strickland*, 466 U.S. at 689). When evaluating prejudice, the petitioner must demonstrate "either: (1) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; or (2) that the result of the proceeding was fundamentally unfair or unreliable." *State v. Syed*, 463 Md. 60, 86 (2019) (quoting *Newton v. State*, 455 Md. 341, 355 (2017)).

I. Trial Counsel's Deficient Performance

A. Cross-Examination of Beran and Beers

The post-conviction court granted relief on two of White's allegations relating to trial counsel's cross-examination of Beran and Beers. In his cross-examination of Beran, trial counsel asked a series of questions that elicited the following responses:

> [TRIAL COUNSEL]: In your experience as a social worker have you ever come across children who have sat in interviews with you who you considered to be lying?

[BERAN]: **Most children don't lie about incidents of sex abuse.**

. . .

[TRIAL COUNSEL]: In your experience as a social worker have you ever come across children that sat in an interview with you that you considered to be lying?

[BERAN]: **Not about sex abuse.**

[TRIAL COUNSEL]: **So never?**

[BERAN]: **Not about sex abuse.**

. . .

[TRIAL COUNSEL]: When [M.N.] said in both the July 3rd interview and the August 8th interview that [White] only touched her on top of her clothes, right, do you believe that she was lying or telling the truth?

[BERAN]: I believe she was lying. She was not prepared to talk about it.

[TRIAL COUNSEL]: . . . So she was lying, you'd acknowledge that she was actually lying?

[BERAN]: In the terms that you're looking at me to say for lying, it would look as though she was lying. But it also could have been repressed memory or she was not prepared to talk about it.

[TRIAL COUNSEL]: How would you define lying?

[BERAN]: Not telling the truth.

[TRIAL COUNSEL]: You would agree with me that [M.N.] was not telling the truth?

[BERAN]: I think there's usually a motive for a child to lie and I do not believe that there was any motive for

[M.N.] to fabricate any of this information. She had nothing to gain.

[TRIAL COUNSEL]: Right. But would you agree with me that her story changed?

. . .

[BERAN]: [It] did. After being in therapy for four to five months and realizing that she was a victim in this and that this was not her fault. She felt safe, which is the ultimate [sic] of the [CAC].

[TRIAL COUNSEL]: Did she feel safe yesterday or did she feel safe in January; did she feel safe in August or did she feel safe in July?

[BERAN]: I think she felt most safe in January when she came into the agency, into the CAC to talk to us.

[TRIAL COUNSEL]: Okay. Why?

[BERAN]: Why? **Because [M.N.] had been trained to be truthful**. [M.N.] had been trained to keep quiet. And [M.N.] each time she came in gave a little bit and a little bit and a little bit. And I think each time she needed to know that she was going to be supported and she was going to feel safe and she was no longer in the care of [M.] so she knew she was being supported by the people who were taking care of her at that time.

(Emphasis added).

The post-conviction court found that trial counsel's cross-examination enabled Beran to give "inadmissible opinion testimony" that bolstered M.N.'s credibility. Indeed, the court found that Beran "explicitly testified more than a dozen times that she believed that children do not lie about allegations of sexual abuse and that M.N. was not lying about

any of the allegations" against White. Because credibility determinations are within the "province of the jury," the court ruled that Beran's testimony during cross-examination was "inadmissible as a matter of law" and therefore eliciting it represented deficient conduct by trial counsel.

Trial counsel asked similar questions of Beers, as evidenced by the following colloquy:

[TRIAL COUNSEL]:	In your expert experience is it unusual for a child to take completely opposite positions on specific facts of an incident?
[BEERS]:	Can you be more specific?
[TRIAL COUNSEL]:	. . . [I]f I were to represent to you that on August 8th [M.N.] testifies that [White] would never do it in the shower, right. And then later in January would testify as to something happening in the shower, right. And then later in January would testify as to something in the shower, right. **Is that consistent with your experience and expertise in how a child would disclose an incident of sexual assault?**
[BEERS]:	**Yes.**
[TRIAL COUNSEL]:	Okay. To take completely opposite positions?
[BEERS]:	Well, they are not taking a position, it's not a game to them. This is a disclosure.
[TRIAL COUNSEL]:	Okay. So which disclosure was accurate, when she said -- when she volunteered that he would never do it in the shower in August, that's one. Or disclosure that something happened in the shower, which one is accurate?

[BEERS]: **I think the testimony that we heard yesterday from her was the truth.**

[TRIAL COUNSEL]: **The testimony on the witness stand?**

[BEERS]: **Yes.**

. . .

[TRIAL COUNSEL]: Okay. Well, the testimony would you agree is different than what she said in the interview, right?

[BEERS]: Correct.

[TRIAL COUNSEL]: Which, in which one is she telling the truth, in your expert opinion?

[PROSECUTOR]: Your honor, I'm going to object, I don't know that she can make that determination, that would be the fact finder.

[COURT]: I think she's already answered the question, quite frankly. Unless I'm misunderstanding the question I think the question was already asked of whether or not she was telling the truth and **I think the witness has testified that she felt she told the truth when she testified in court. Am I misstating that?**

[BEERS]: **No.**

. . .

[TRIAL COUNSEL]: Is that consistent with some of the other children that you have evaluated that will make up fiction to get more attention?

[BEERS]: No, not in sex abuse cases, no.

[TRIAL COUNSEL]: But for other reasons?

[BEERS]:	And I looked at this as, you know, [White] hit me or [White] said something to me versus [White] put his finger in my private. Those are two different things to be able to get attention for.
[TRIAL COUNSEL]:	Okay.
[BEERS]:	You know, children, I could see children saying, you know [White] is punishing, you know, this child less than me, or [White] is picking on me. **But to try to get attention by saying [White] put his finger in my private, that is not something that children would normally make up.**

(Emphasis added).

The post-conviction court also found that this line of questioning was inadmissible because it "constituted opinion testimony regarding M.N.'s credibility." In addition, the court found that trial counsel was deficient because he elicited inadmissible testimony that allowed Beers to "effectively vouch[] for M.N.'s truthfulness and provide[] theories that could explain M.N.'s inconsistent statements." Moreover, the court concluded that because Beers's opinions "paralleled" those of Beran, trial counsel should have realized that his cross-examination of Beers would lead to "a similar disastrous result."

The State argues that the trial court erred because it failed to "indulge a strong presumption" as required by *Strickland*, asserting that trial counsel's conduct was part of a trial "tactic to elicit the witnesses' bias in favor of" M.N. White responds that the court correctly determined that trial counsel was deficient by eliciting inadmissible credibility opinions from Beran and Beers during cross-examination.

We agree with the post-conviction court that trial counsel was deficient for eliciting inadmissible and prejudicial testimony. A "fundamental principle underlying trial by jury is that 'the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury.'" *Fallin v. State*, 460 Md. 130, 154 (2018) (quoting *Bohnert v. State*, 312 Md. 266, 277 (1988)). Testimony that indicates a "statement, belief, or opinion of another person to the effect that a witness is telling the truth or [is] lying" is inadmissible. *Bohnert*, 312 Md. at 277.

The inadmissibility of this testimony takes on additional significance in child sex abuse cases, where convictions often "turn[] on whether the jury believe[s] certain statements of the child." *Fallin*, 460 Md. at 135. In *Fallin*, the Supreme Court reversed a child sex abuse conviction when a forensic examiner testified that the alleged victim "showed 'no signs of fabrication' and that the examiner had no concerns about fabrication" regarding the child's accusations against the appellant. *Id.* at 132. The Court noted that the "inevitable conclusion" from the examiner's testimony was that the child's "statements concerning touching incidents by Mr. Fallin were not 'incorrect'—*i.e.*, true." *Id.* at 157. Because this provided inadmissible testimony regarding credibility, the Court reversed and remanded for a new trial. *Id.* at 161; *see also Hutton v. State*, 339 Md. 480 (1995) (reversing a child sex abuse conviction when a social worker testified to her opinion of the "consistency" of the victim's statements and when a psychologist attributed the victim's PTSD to prior sexual abuse); *Bohnert*, 312 Md. at 278-79 (reversing a child sex abuse conviction when a social worker's testimony that, in her opinion, the child was a victim of

sexual abuse was "tantamount to a declaration by her that the child was telling the truth and that Bohnert was lying"). *But see Yount v. State*, 99 Md. App. 207 (1994) (affirming a child sexual offense conviction when the expert gave testimony regarding general psychological phenomenon that did "nothing to indicate that the victim's version of events rather than the appellant's version of events should be believed").

Here, trial counsel elicited inadmissible testimony that was harmful to White's defense. Trial counsel's cross-examination introduced into evidence multiple inadmissible statements, including Beran's testimony that "most children don't lie" about sex abuse and Beers's opinion that M.N. was telling the truth at trial. As noted above, Maryland courts have previously held that such testimony constitutes reversible error because it improperly bolsters the credibility of the accuser and invades the "province of the jury." *Fallin*, 460 Md. at 154 (quoting *Bohnert*, 312 Md. at 277). Although these cases involve inadmissible testimony elicited by the prosecution, the same principles apply in this post-conviction context where *defense counsel* elicited testimony that aided the issue central to the State's case—M.N.'s credibility. Trial counsel's substandard legal representation is underscored by the prosecutor's objection on the ground that Beers was giving inadmissible credibility testimony, a warning that trial counsel ignored when he asked Beers yet another set of questions that allowed her to bolster M.N.'s credibility.

The State argues that the post-conviction court erred because it refused to recognize trial counsel's "erudite" strategy to demonstrate Beran and Beers's bias in favor of M.N. due to their steadfast belief in her core allegations. Our review of the record, however,

does not support the State's argument. Trial counsel did not utilize his brief closing argument to draw attention to the answers he elicited in cross-examination or in any way address Beran and Beers's testimony. Instead, he made one positive passing reference to the State's witnesses, saying "[w]e have admitted lying by every single person, other than the professionals [Beran and Beers]." Furthermore, when asked about his trial strategy at the post-conviction hearing, trial counsel stated that Beran and Beers's "credibility, in my opinion, was not at issue in the case." We cannot give credence to a purported strategy that trial counsel himself has not articulated or acknowledged. Moreover, we see nothing in the record to support the State's contention that "defense counsel effectively sought to diminish the value of the State's expert and a key State's witness" by "attempting to display to the jury that the witnesses lacked credibility." In short, our independent review of the record demonstrates that trial counsel made no effort to convince the jury that Beers and Beran inappropriately accepted M.N.'s allegations as truthful.

Additionally, we agree with the post-conviction court that, if there was a strategy to diminish Beran and Beers's credibility, trial counsel was deficient for doggedly pursuing questions that were, at best, "fruitless," and at worst, "actively harmful" to White's defense. The answers that Beran and Beers gave during direct examination clearly indicated that they understood that M.N. had provided inconsistent versions of the events but that, in their opinion, they believed that M.N. was being truthful as to the allegations of sexual abuse. Beran had already testified on direct examination that it was a "misconception[]" that "children will make [up] allegations . . . [to] try[] to get somebody in trouble" and stated

that it is "not a common occurrence for children to make up allegations of child sexual abuse[.]" Beran noted that it was normal for children's stories to evolve over the course of multiple interviews because "[d]isclosure is a process[.]" Beran also testified that, in her experience, it is "common" for children not to remember aspects of child abuse in early interviews because it is difficult for them to access memories that are "traumatizing."

Similarly, Beers testified that, because disclosure is a process, it would be inaccurate to describe initial denials of abuse as lies. Beers agreed that M.N.'s interviews with Beran "demonstrate[d] . . . the process of delayed disclosure" and that this helped explain why M.N.'s account "evol[ved]" over time. Beers also explained why it would be normal for M.N.'s testimony to have inconsistencies vis-à-vis her previous interviews.

In light of their testimony on direct examination, it should have been apparent to trial counsel that his line of questioning would only serve to give Beran and Beers an additional platform to reaffirm their opinions. Trial counsel had already elicited testimony from M.N. that she had lied in her interviews and that she had provided inconsistent versions of the events. Trial counsel's attempts to get Beran and Beers to restate the same thing was not only unnecessary, but it also gave them another opportunity bolster M.N.'s credibility and provide additional explanations for M.N.'s inconsistencies. Because trial counsel's questioning of Beran and Beers produced predictably harmful, and inadmissible, testimony, we hold that the post-conviction court correctly concluded that trial counsel's cross-examination of Beran and Beers constituted deficient performance under

Strickland's first prong.[5]

B. Trial Counsel's Failure to Object to Other Crimes Evidence by M.N.'s Sister

The post-conviction court granted White relief on the ground that trial counsel was ineffective for failing to move *in limine* to exclude statements made by M.N. in two of the recorded interviews that White had also abused her sister, B.[6] As stated above, three videos of M.N.'s interviews with Beran, along with their transcripts, were admitted into evidence. During M.N.'s first interview in July 2018, M.N. recounted an instance where White touched her while he was tickling her and B.:

[BERAN]:	Okay. Did he ever like touch you somewhere or do something like to be kind of joking but you didn't think it was funny?
[M.N.]:	Yeah.
[BERAN]:	All right. Tell me.
[M.N.]:	He touched me on my private part once.
	. . .
[BERAN]:	. . . [W]as it just you and [White] or was anybody else there?
	. . .
[M.N.]:	My sister, [B.]

[5] White also argues that trial counsel was deficient for questioning Beran like an expert witness when she was not qualified as one. However, White does not challenge the post-conviction court's determination that he failed to demonstrate prejudice on this point because Beers expressed similar opinions—as an expert—that were not challenged.

[6] B. is a minor and we will refer to her in this manner to protect her confidentiality.

. . .

[BERAN]: Okay. And what did he do, like what happened next?

[M.N.]: He -- I think he -- came in and like started like trying to like tickle us and stuff like that. And I didn't like it and then he like did stuff [inaudible].

. . .

[BERAN]: . . . **Was he doing the same thing to [B.] or just you?**

[M.N.]: **Yeah.**

[BERAN]: **To both of you at the same time?**

[M.N.]: **(Nodded head in the affirmative.)**

(Emphasis added).

After M.N. said that White touched her on her private parts, Beran asked:

[BERAN]: Okay. Do you think he ever tried doing that to [B.] or did she ever tell you --

[M.N.]: Yeah. I think she did because she usually tells me like something if something's off because I'm like old enough because I'm like her Mom.

During M.N.'s third interview in January 2019, M.N. recounted to Beran that White tried to force her to engage in fellatio, that B. knew about this incident, and that B. was also touched by White multiple times:

[M.N.]: Yeah. Me and [B.] could tell each other anything. [B.] knows everything.

[BERAN]: She knows everything that's happened?

[M.N.]: Uh-huh.

[BERAN]: So tell me, did you tell her about -- you said you told her about this time?

[M.N.]: Yeah.

[BERAN]: Did you tell her about any other time?

[M.N.]: I told her about the second time it happened which I got away with it because I didn't do it. And then that time I did -- I don't know if I told her that time. I might have told her. And then I -- and then when he, like, started touching me and stuff, like I told her about it.

[BERAN]: Okay.

[M.N.]: **And when she told me that she did get touched by [White]** --

[BERAN]: **She told you that?**

[M.N.]: **Yeah.**

. . .

[BERAN]: Okay. And did – let's talk a bit about [B.], okay. Tell me -- I know I just heard you say that you told her that these things were happening to you.

[M.N.]: Uh-huh.

[BERAN]: What did she tell has happened to her?

[M.N.]: **She told me that she was touched by [White] twice.**

[BERAN]: Okay.

[M.N.]: **Two or four times.**

. . .

[BERAN]:	And when she said touched, did she say any details? Did she go into anything --
[M.N.]:	She didn't (inaudible) because she didn't want to talk about it because she didn't (inaudible) to anyone.
[BERAN]:	Okay.
[M.N.]:	But all she said that he said -- she said that maybe he went in, but I think he -- she said I think it was already in (inaudible).
[BERAN]:	Okay. And she told you that. Do you remember how old she would have been when this -- when this was happening?
[M.N.]:	She would have been five.

(Emphasis added).

The post-conviction court found that trial counsel's failure to file a motion *in limine* to exclude the statements or object to their admission during trial was "clearly deficient." In its opening brief, the State argues that "[i]f the jury caught that fleeting reference [of abuse against B.], mentioned only in a single interview, . . . it might have wondered why there was no further evidence presented regarding her sister's abuse and could interpret this absence as support that it never happened, further discrediting M.N."[7] The State doubles down on this point in its Reply Brief by noting that there was no evidence to corroborate allegations of abuse against B., suggesting to the jury that M.N. was not

[7]At oral argument, the State acknowledged that it incorrectly stated that M.N. mentioned abuse against B. "only in a single interview."

credible. White responds that trial counsel was deficient for failing to suppress M.N.'s "highly inflammatory statements."

"[T]here are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he [or she] is on trial, even of the same type, is inadmissible." *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *State v. Taylor*, 347 Md. 363, 369 (1997)). Notwithstanding certain exceptions, evidence of "other crimes" committed by the defendant is inadmissible and is prohibited by Md. Rule 5-404(b).[8] "The primary concern underlying the Rule is a 'fear that jurors will conclude from evidence of other bad acts that the defendant is a 'bad person' and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking." *Id.* (quoting *Harris v. State*, 324 Md. 490, 496 (1991)).

We agree with White that trial counsel was deficient for failing to make any attempt to exclude M.N.'s statements related to White's abuse of B. Before trial, the prosecution moved to admit M.N.'s three interviews and their transcripts under Md. Code (2001, 2018

[8] Md. Rule 5-404(b) provides that:

> [e]vidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identify, absence of mistake or accident, or in conformity with Rule 5-413.

White correctly notes that the State does not contend in its brief that M.N.'s statements about White's abuse of B. were admissible under Rule 5-404(b).

Repl. Vol.), § 11-304 of the Criminal Procedure Article ("CP"), which provides that out-of-court statements by child victims of sex abuse and interviewing social workers may be admitted under certain circumstances. Trial counsel objected to the motion, describing the issues as "somewhat subtle." Trial counsel argued that M.N.'s "narrative is inconsistent" in the videos because she was getting "positive reinforcement" that "may be influencing [her] to tell the story a certain way." Trial counsel then concluded that M.N. should instead be cross-examined in court in order to comport with White's due process rights for confronting his accuser. In a written opinion, the trial court found the three interviews to "possess particularized guarantees of trustworthiness" and admitted them pursuant to CP § 11-304.

Notably, trial counsel did not object to the admission of the videos based on the general inadmissibility of other crimes evidence. At trial, trial counsel had no objection to the admission of the July 2018 interview (and related transcript) where M.N. reported, twice, that White touched B. Similarly, trial counsel had no objection to the admission of the January 2019 interview and transcript despite M.N. reaffirming in that interview that White touched B. "two to four times."

When asked about this "other crimes evidence" during the post-conviction hearing, trial counsel noted that there was a "lengthy motions hearing" regarding the interviews but had no recollection of M.N.'s allegations regarding White and B. When asked specifically whether he moved *in limine* to exclude M.N.'s statement in the January 2019 video, trial

counsel responded, "No." When asked if he ever requested the court to exclude that statement from the interview, trial counsel responded, "I don't remember."

We reject the State's argument that trial counsel's failure to exclude M.N.'s statements was a valid tactical decision. The post-conviction court expressly found that trial counsel, "did not provide any explanation as to why he failed to file a motion *in limine* to exclude this disclosure or, at a minimum, lodge an objection at trial." The record demonstrates that, instead of being part of a strategy to diminish M.N.'s credibility, trial counsel was most likely unaware of the existence of these damaging allegations. We cannot presume that "counsel's conduct falls within the wide range of professional assistance" when trial counsel himself has failed to describe a coherent strategy on this issue. *Davis*, 249 Md. App. at 222 (quoting *Strickland*, 466 U.S. at 689). Therefore, we hold that the post-conviction court was correct when it found that trial counsel was deficient for failing to exclude M.N.'s other crimes statements.[9]

II. Cumulative Effect of Prejudice

Having found that trial counsel was deficient on four of his allegations of error, the post-conviction court determined that each error was "sufficient on its own to grant relief," but alternatively concluded that the cumulative effect of the errors warranted post-

[9] The post-conviction court also granted White relief by finding that trial counsel was ineffective for allowing M. to testify that she was raped by White on multiple occasions. We note that there is some evidence that this may have been part of a trial tactic to contradict M.'s testimony through White's unequivocal denial of rape. Thus, a reasonable argument can be made that this was part of trial counsel's attempt to undermine M's overall credibility. Nevertheless, we decline to address this issue as it is not material to our resolution of this case.

conviction relief. The State argues that, even if there was some deficiency, the resulting prejudice did not create a substantial probability of a different outcome. White naturally concurs with the post-conviction court's analysis.

In this case, we need not decide whether each individual deficiency resulted in prejudice under *Strickland* because we are persuaded that the cumulative effect of trial counsel's errors undermines confidence in the jury's verdict. *See Cirincione v. State*, 119 Md. App. 471, 506 (1998). In *Bowers v. State*, 320 Md. 416 (1990), a petitioner successfully demonstrated that the cumulative effect of his counsel's conduct was deficient. There, significant disagreements between Bowers and his counsel led trial counsel to put on a substandard defense wherein he, among other deficiencies, rarely met with Bowers, failed to investigate exculpatory evidence, failed to cross-examine officers during a suppression hearing, failed to impeach a witness for inconsistent statements, allowed other crimes evidence in without objection, failed to give an opening statement, and failed to request a critical jury instruction at the heart of Bowers's defense. *Id.* at 434-35. Despite the fact that each of the "individual errors may not be sufficient to cross the threshold" of ineffective assistance, the Maryland Supreme Court held that "their cumulative effect" was. *Id.* at 436.

Although trial counsel's deficiencies in the instant case are less serious than those in *Bowers*, we hold that there is a significant possibility that their cumulative effect may have altered the outcome of the trial. Trial counsel acknowledged that, given the lack of physical evidence, M.N.'s credibility was the central issue at trial. Trial counsel's cross-

examination of Beran and Beers impermissibly bolstered M.N.'s credibility by giving them a platform to tell the jury that children never lie about sex abuse and that M.N.'s testimony was truthful. Additionally, the other crimes evidence admitted via M.N.'s interviews potentially bolstered her credibility by allowing the jury to hear that White sexually abused B. as well. This may have enabled the jury to conclude that White was a "'bad person' . . . deserv[ing of] punishment" given the inflammatory nature of child sex abuse. *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *Harris v. State*, 324 Md. 490, 496 (1991)). In a child sex abuse case, there are few "other crimes" that could be more prejudicial to the defense than additional allegations of child sex abuse regarding another child.

In addition, although trial counsel attacked M.N.'s credibility during closing argument, it gives us pause that he failed to challenge Beran and Beers's unequivocal testimony that M.N. was truthful regarding White's sexual abuse. In a prosecution where both parties acknowledge that M.N.'s credibility was central to the case, we conclude that there is a reasonable possibility that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Syed*, 463 Md. at 86. Specifically, our review of the totality of the evidence and trial counsel's overall performance undermines our confidence in the outcome. *Strickland*, 466 U.S. at 694. Even though trial counsel's "individual errors may not [have been] sufficient to cross the threshold" of ineffective assistance of counsel, their cumulative effect did in this case. *Bowers*, 320 Md. at 436. Because we hold that trial counsel's performance was both deficient and prejudicial under

Strickland, we affirm the decision of the post-conviction court.[10]

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[10] Finally, White makes several arguments that he was prejudiced because, if not for trial counsel's various alleged deficiencies, he would have had multiple meritorious issues on appeal. The Maryland Supreme Court foreclosed this theory in *State v. Newton*, 455 Md. 341 (2017), when it noted that the failure-to-preserve "argument assumes, however, that the trial court would have" allowed the legal error despite it being brought to the court's attention. *Id.* at 361. "When we examine prejudice for an ineffective assistance-of-counsel claim, we 'presume . . . that the judge . . . acted according to law." *Id.* (quoting *Strickland*, 466 U.S. at 694). Therefore, White's failure-to-preserve arguments have no bearing on our prejudice analysis.