Circuit Court for Cecil County
Case No. 07-K-15-001678

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2659

September Term, 2019

JULIUS DEVINCENTZ, JR.

V.

STATE OF MARYLAND

Graeff,
Beachley,
McDonald, Robert N.
(Senior Judge,
Specially Assigned),
JJ.

Opinion by McDonald, J.

Filed: October 4, 2023

Appellant Julius Devincentz, Jr., was convicted following a jury trial on various charges related to allegations that he had sexually abused his stepdaughter, who was a minor at the time of the alleged acts. In this appeal, he asserts that he was deprived of a fair trial by the testimony of two witnesses that appeared to allude to prior bad acts by him and by the trial court's denial of his related motions for a mistrial. In addition, he argues that the trial court erroneously admitted (1) testimony by the stepdaughter about her feelings and relationship with her mother after she disclosed the alleged abuses to a therapist and (2) testimony by that therapist about changes in the stepdaughter's demeanor after she made that disclosure.

For the reasons explained below, we hold that the trial court neither erred nor abused its discretion in its rulings concerning the motions for a mistrial and the admission of the challenged testimony. Accordingly, we affirm Mr. Devincentz's convictions.

I

Background

In 2008, Mr. Devincentz began a romantic relationship with a woman to whom we shall refer as Y.D.[1] Y.D., together with her son and her then six-year-old daughter, to whom we shall refer as K.C., moved from Pennsylvania to Mr. Devincentz's home in Elkton, Maryland. Mr. Devincentz's two children also lived in the home at various times. Mr. Devincentz and Y.D. married in September 2013.

[1] For consistency, we use the initials adopted by the Court of Appeals of Maryland (now known as the Supreme Court of Maryland) for certain witnesses in its opinion concerning an appeal of a prior trial of the charges against Mr. Devincentz. *See Devincentz v. State*, 460 Md. 518 (2018).

In April 2015, when K.C. was 13 years old, she moved out of the family home and into a residential facility for juveniles. In September 2015, K.C. told a therapist at that facility that Mr. Devincentz had sexually abused her in various ways, beginning when she was about seven years old. The therapist reported K.C.'s statements to Child Protective Services ("CPS"), which opened an investigation. A CPS investigator interviewed K.C. later that month. Soon thereafter, the police contacted Mr. Devincentz, who was interviewed at the police station.

Thereafter, Mr. Devincentz was indicted in the Circuit Court for Cecil County on various charges of assaulting and sexually abusing a minor. In 2016, he was tried on those charges. The jury convicted him of all but one of the charges. His convictions were later vacated on appeal. *Devincentz v. State*, 460 Md. 518 (2018).[2]

After the case was remanded to the Circuit Court, a retrial was held on June 12 and 13, 2019. The evidence before the jury at that trial consisted entirely of witness testimony. The State called five witnesses. The first was K.C. After testifying about how she and her mother came to reside in Mr. Devincentz's home in Elkton, K.C. described in detail that Mr. Devincentz had sexually abused her in a number of ways while she was a child and lived in his household. She also testified about disclosing the abuse to the therapist at the juvenile facility and about her feelings and relationship with her mother after making the disclosures.

[2] In reversing the convictions, the Court of Appeals held that the trial court had improperly excluded testimony by Mr. Devincentz's son that K.C. did not always tell the truth and that she had threatened to get Mr. Devincentz "in trouble." 460 Md. at 562.

Y.D. testified about how the two families came to live together, her marriage to Mr. Devincentz, statements that he made to her while they were driving to the police station for his interview about K.C.'s allegations, her initial doubts about those allegations, and her later suspicions that they were true based on a change in K.C.'s behavior.

The therapist from the juvenile facility testified about K.C.'s disclosure to her that Mr. Devincentz had sexually abused K.C. and about the therapist's observations of changes in K.C.'s behavior. The CPS investigator testified about her own interview of K.C. The State also called a police detective at the Elkton police department and a CPS assessor at the Cecil County Department of Social Services to testify; both had interviewed Mr. Devincentz and Y.D. when the abuse was reported.

The defense presented three witnesses. Y.D., recalled to the stand, testified that a Child in Need of Assistance investigation had been opened at some point, that Mr. Devincentz "had to leave the home for a while," and that she had been told not to contact K.C. at that time. Mr. Devincentz's stepdaughter from a prior marriage, who had lived in his house for a period of time while K.C. and her family also lived there, testified about her observations of the household, including the housekeeping chores that all of the children had to do; K.C.'s dislike of the chores and fights with the adults when she did not want to do them; and K.C's desire to move back to Pennsylvania whenever "she was in trouble." Mr. Devincentz's son from a prior marriage had also lived in the house; he testified that Mr. Devincentz was a loving father and that K.C. had resisted parental direction and often did not tell the truth. Mr. Devincentz exercised his right not to testify on his own behalf.

Certain testimony of K.C., Y.D., the therapist, and the CPS investigator – and the trial court's rulings with respect to certain aspects of that testimony – will be described more fully where relevant in the next section of this opinion.

The jury found Mr. Devincentz guilty of assaulting and sexually abusing a minor and returned a guilty verdict on each of the counts before it. Mr. Devincentz was sentenced to 25 years imprisonment.[3]

II

Discussion

Mr. Devincentz poses three questions, which we have re-phrased and re-ordered as follows:

(1) Did the trial court abuse its discretion when it declined to declare a mistrial in response to witness testimony suggesting that Mr. Devincentz had committed prior bad acts?

(2) Did the trial court err when it allowed K.C. to testify about the effect on her of disclosing the alleged abuse?

(3) Did the trial court err when it allowed the therapist from the juvenile facility to testify about how K.C.'s behavior changed after she disclosed the alleged abuse to the therapist?

[3] The court imposed a sentence of 25 years imprisonment on the charge of sexual abuse of a minor. The convictions on three counts of sexual offense in various degrees were merged into the child sexual abuse count for purposes of sentencing. The court imposed a consecutive suspended sentence of 10 years imprisonment for the conviction of second-degree assault.

A. Whether the Trial Court Abused its Discretion in Declining to Declare a Mistrial

The general rule under Maryland law is that evidence of "other bad acts" of a defendant is not admissible unless an exception to that general rule applies. *See generally* Maryland Rule 5-404(b).[4]

During the trial, two witnesses seemingly referred to prior bad acts by Mr. Devincentz. In both instances, the defense moved for a mistrial, asserting that the State had elicited testimony that impermissibly conveyed to the jury that Mr. Devincentz had committed, or had been investigated for, criminal conduct toward K.C. other than the conduct alleged in the indictment. With respect to one instance, the trial court had previously granted a pretrial defense motion *in limine* to exclude evidence of the alleged prior bad act. With respect to both instances, the court denied the motions for a mistrial and instructed the jury to disregard the testimony at issue.

The question here is whether those two particular references, viewed separately or cumulatively, deprived Mr. Devincentz of a fair trial. We begin with the pertinent testimony and events at trial.

[4] Evidence of other sexually assaultive behavior may be admitted in a sexual assault prosecution when it meets the conditions set forth in Maryland Code, Courts & Judicial Proceedings Article ("CJ"), §10-923; *see also* Maryland Rule 5-413 (incorporating the conditions of CJ §10-923 in a rule that became effective after the date of trial at issue in this appeal); *Woodlin v. State*, 484 Md. 253 (2023) (construing CJ §10-923). That statute is not at issue here, as the State has not contended that the testimony in question was admissible under it.

1. Circumstances of the Mistrial Motions

Mistrial Motion Based on Y.D.'s Testimony

In response to questions posed by the State during her direct examination, Y.D. testified that she was living with Mr. Devincentz when the juvenile facility reported K.C.'s allegations of abuse to CPS. Y.D. stated that she drove Mr. Devincentz to the police station after he "got a phone call." She described their conversation before that trip in the following colloquy:

[Prosecutor]:	Before going to the police station did you all have any conversation about why you were headed to the police station?
[Y.D.]:	Yes.
[Prosecutor]:	What did the defendant say to you?
[Y.D.]:	He said it was . . . that [K.C.] made allegations against him.
[Prosecutor]:	Did you all have any other conversation before getting to the police station?
[Y.D.]:	Yes.
[Prosecutor]:	What, if anything, did the defendant say to you?
[Y.D.]:	He said he didn't want to go through it again.
[Defense Counsel]:	Objection, Your Honor.

A bench conference ensued. Moving for a mistrial, defense counsel argued that Y.D.'s testimony that Mr. Devincentz told her that "he didn't want to go through it again" improperly "implie[d] to the jury that there's been a prior incident with [him] at the police station regarding something of this nature." Counsel further argued that Y.D. had "just

inferred and implied there was a prior bad act, so at this point we're going to have the jurors wondering . . . what was happening before, what's going on." The prosecutor responded that Y.D. had been warned not to talk "about any prior allegations" and suggested that a cautionary instruction could cure any prejudice.

The trial court observed that it was not clear what the jury would infer from Y.D.'s statement. Referring to the fact that the defense had already cross-examined K.C. extensively about her testimony at a prior "trial," the court noted that "[o]bviously, . . . the jury knows something happened before these proceedings that we're here for today. So I'm just going to instruct the jury to disregard the question and the answer and just don't ask anything unless you need to, once again, just talk to your witness to instruct her not to mention any other events."

The trial court then instructed the jury: "I'm directing you to disregard the last question and the last response. Do not even consider that at any time." Further, after recessing to enable the prosecutor to remind Y.D. of the court's pretrial rulings, the court again instructed the jury: "[J]ust a reminder, please disregard the last question and response. Do not consider the question or response in any manner."[5]

[5] Later, when instructing the jury before closing arguments, the trial judge instructed the jurors more generally that they were not to consider evidence that he had told them to disregard. In language that tracked pertinent parts of the Maryland Criminal Pattern Jury Instructions, the court instructed:

> The following things are not evidence and you should not give them any weight or consideration: Any testimony that I struck or told you to disregard and any exhibits that I struck or did not admit into evidence, and questions that the witnesses were not permitted to answer, and objections of the lawyers. When I did not permit the witness to answer a question, you

Mistrial Motion Based on the CPS Investigator's Testimony

Prior to jury selection, the defense moved *in limine* to exclude evidence that Mr. Devincentz had urinated on K.C., an act that was not among the charges before the jury. In opposition to the motion, the State argued that such conduct fell within a "sexual propensity" exception to the general rule excluding evidence of other crimes and relied on case law, including *Vogel v. State*, 315 Md. 458, 465 (1989), for that proposition. That exception applies "when (1) the prosecution is for sexual crimes, (2) the prior illicit sexual acts are similar to that for which the accused is on trial, and (3) the same accused and victim are involved." *Vogel*, 315 Md. at 465.[6] Additionally, the trial court must determine that "the accused's involvement in the other crime[]is established by clear and convincing evidence" and "must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission." *Hurst v. State*, 400 Md. 397, 408 (2007) (citation and internal quotation marks omitted).

After hearing additional argument, the trial court granted the defense motion and ruled that the State could not introduce that evidence as the court did not believe it met the threshold requirement of being "a similar or same type of criminal act."

> must not speculate as to the possible answer. If after an answer was given I ordered the answer be stricken, you must disregard both the question and the answer.

See MPJI-Cr 3:00 (2d ed. with 2022 Replacement Pages).

[6] In 2018, the *Vogel* exception was substantially codified by the General Assembly in CJ §10-923. That statute enlarged in certain respects the exception created in the case law and added procedural requirements. *See* footnote 4 above.

During the trial, the CPS investigator was questioned by both the prosecutor and defense counsel about her interview of K.C. in September 2015. On direct examination by the State, the CPS investigator described K.C.'s demeanor during that interview and K.C.'s allegations that Mr. Devincentz had sexually abused her. On cross-examination, defense counsel questioned the investigator about specific abusive acts that K.C. had described during her trial testimony but apparently had not mentioned to the investigator during the September 2015 interview. On redirect examination, the prosecutor posed a general question about the interview:

[Prosecutor]:	[W]hat do you remember [K.C.] telling you in that interview?
[CPS Investigator]:	In regards to this maltreater?
[Prosecutor]:	Yes.
[CPS Investigator]:	She disclosed that Mr. Devincentz had urinated on her.

Defense counsel objected; a bench conference ensued. At the bench conference, the following colloquy occurred:

The Court:	That's the problem you get when you open the door, you ask questions, and then – you can't open the door and then – you can't open the door and then –
[Defense Counsel]:	That did not open any door, Your Honor. She heard –
The Court:	Well, you asked about conversations –
[Defense Counsel]:	Specific incidents.
The Court:	Well –

[Defense Counsel]: I was very specific. And, number two, the State had been instructed nobody can talk about the other. So I'm moving for a mistrial.

The Court: We're not – I'm not granting a mistrial. I'll tell the jury to strike it. He's not charged with this. But –

[Defense Counsel]: Your Honor, I think a mistrial is warranted at this time. This is a prior act for which he was charged for.

The Court: They don't know that. They don't know that.

[Defense Counsel]: Your Honor, this is another – this is a bad act. The Court made a ruling that it was not permitted in this trial.

The Court: And I'm going to instruct the jury to disregard it.

[Defense Counsel]: Yes, Your Honor. I don't think that it's enough.

The Court: Okay. We disagree. We agree to disagree.

[Defense Counsel]: If I could just make a record, Your Honor.

[Prosecutor]: Also, [K.C.] didn't testify to the urination because she had been instructed not to.

[Defense Counsel]: No witness should've testified to it. Your Honor, at this point we have had evidence from one of the State's witnesses that there was a prior -- there was some kind of prior investigation regarding my client, which is prior bad acts that's not permissible in court. Now we have a forensic interviewer who's talking about the fact that my client urinated on the victim, which was the subject of a motion prior to trial. So now we have other incidents –

The Court: Okay. But the jury doesn't know all that stuff about the motions prior to trial. Right now all they've heard is one statement and I'm going to

> tell them to disregard it, that he's not charged with that.
>
> [Defense Counsel]: Your Honor, at this point I think it is impossible for my client to have a fair trial. I think that this Court needs to find that a mistrial is warranted under these facts, and I would object to any further proceeding in this matter.

After denying the defense motion for a mistrial, the trial court gave the jury the following instruction:

> Ladies and gentlemen of the jury, again, please disregard that last question and that last answer. Do not consider it in any way. That matter has nothing to do with this trial here today and it should not be used or considered by you in any way.

The CPS investigator then testified, without objection, about K.C.'s description during the interview of occasions on which Mr. Devincentz digitally penetrated her vagina**.**

Post-trial Motion for New Trial

In a motion filed after the jury returned its guilty verdict, defense counsel sought a new trial on the ground that the trial court's instructions to the jury to disregard Y.D.'s and the CPS investigator's testimony with respect to other alleged bad acts were insufficient to ensure that Mr. Devincentz received a fair trial. After hearing argument on that motion, the trial court elaborated on its reasoning for denying the prior defense motions for mistrial and denied the motion for a new trial. The court stated:

> . . . I don't think there was any intentional violation of the Court's *in limine* orders by [the investigator][7] or anybody else. Again, throughout this trial there was questioning by the defense about the prior trial. And I'm not sure what the jury understood or didn't understand. But, again, these were just

[7] The trial judge used the therapist's name here, but the context makes clear that he was referring to testimony by the CPS investigator.

> brief blurt-outs. The Court gave curative instructions immediately to the jury. There is no indication that the jury did not follow the Court's instructions. There [were] no questions from the jury that would indicate to the Court that they did not follow the Court's instructions. So the Court does not find that the potential prejudice by these brief blurt-outs outweighed the Court's curative instructions. So the Court is going to deny the motion for a new trial.

2. Applicable Legal Standards

A mistrial is an "extraordinary remedy" to which a trial court should resort only "if necessary to serve the ends of justice." *Carter v. State*, 366 Md. 574, 589 (2001). (citation and quotation marks omitted). In assessing the need to declare a mistrial based on an inadmissible statement by a witness about other bad acts of the defendant, a trial judge is to determine whether the prejudice to the defendant was so substantial that the defendant was deprived of a fair trial or whether, instead, the right to a fair trial was adequately protected by a curative jury instruction. *Rainville v. State*, 328 Md. 398, 408 (1992).

A trial judge's decision whether or not to grant a motion for a mistrial is reviewed on appeal under an abuse of discretion standard. *Carter*, 366 Md. at 589. An appellate court gives some deference to a trial judge's ruling as the trial judge is "physically on the scene," is "able to observe matters not usually reflected in a cold record," and thus "has [a] finger on the pulse of the trial." *State v. Galicia*, 479 Md. 341, 385 (2022) (citation and internal quotation marks omitted). "In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Simmons v. State*, 436 Md. 202, 212 (2013) (citation and quotation marks omitted). Accordingly, the decision whether to grant a mistrial "lies within the sound discretion of the trial judge."

When applying the abuse of discretion standard, an appellate court "'look[s] to whether the trial judge's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Simmons*, 436 Md. at 212–13. The appellate court assesses the effect of the challenged testimony and the curative instruction in the context of the particular trial: "The applicable test for prejudice is whether [the Court] can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by [that action]." *Cooley v. State*, 385 Md. 165, 175 (2005) (citation and internal quotation marks omitted). In that overall inquiry,"[t]he decisive factors are the closeness of the case, the centrality of the issue affected by the [erroneous action], and the steps taken to mitigate the effects of the [action]." *Id*. The appellate court thus looks at both the "'probability of prejudice from the face of the extraneous matter'" and the efficacy of the curative instruction. *Id.* at 174-75.

Analysis of the potential prejudicial effect of improper testimony can be thought of in two steps: whether the testimony actually conveyed to the jury information adverse to the defendant, and, if so, whether the effect of that testimony was prejudicial in context. With regard to the first step, *Carter* provides an example of whether the testimony actually conveyed prejudicial information. There, the Court held that a police officer's reference to the defendant's "prior arrest" was prejudicial because it clearly conveyed the information that the defendant had been arrested in an earlier matter. *Carter*, 366 Md. at 591. By contrast, in *Jones v. State*, where a witness had referred to visiting the defendant "at Lewisburg," the Court held that the trial court properly denied the defendant's mistrial

motion because "[a]lthough it may be generally known that a federal prison is located at Lewisburg, Pennsylvania, no mention was made of Jones's prior criminal record or that he had been an inmate at the prison." *Jones v. State*, 310 Md. 569, 588 (1987), *rev'd on other grounds*, 486 U.S. 1050 (1988).

If the testimony in question carries a meaning adverse to the defendant, the appellate court proceeds to the second step of the prejudicial effect analysis. At that step, the court looks to various factors (sometimes referred to as the "*Rainville* factors" or the "*Carter* factors"), including "whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . ." *Carter*, 366 Md. at 590 (quoting *Rainville*, 328 Md. at 408).

As to whether a curative instruction adequately protected an accused's right to a fair trial, the appellate court will consider whether the instruction was "timely, accurate, and effective." *Carter*, 366 Md at 589. In *Carter*, the Court held that the curative instructions given in that case were not effective. There, a police officer, in describing his interview of the defendant, stated, "When confronted with the fact that he had a prior arrest, he admitted the prior arrest included or was for—." *Id*. at 579. In its curative instruction, the trial court summarized that testimony and then repeated the word "arrest" four times in telling the jury to ignore the reference. *Id*. at 580.

3. Analysis

The question is whether the trial court's denial of the mistrial motions was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Simmons*, 436 Md. at 212–13. More specifically, was it manifestly unreasonable (or untenable) for the trial judge to conclude that any potential prejudice to Mr. Devincentz in the two instances of testimony, viewed separately or cumulatively, could be remedied by a curative instruction?

As to each motion, our answer to that question is "No**."**

Motion Based on Y.D.'s Statement

With respect to Y.D.'s testimony that Mr. Devincentz told her that he "did not want to go through that again," the threshold question is whether there was a probability of prejudice on the face of that statement. The trial court found that there was not; it viewed the statement as a "brief blurt-out" that the jury did not necessarily understand and that could be cured by an instruction to disregard the statement.

The record supports that ruling for a number of reasons. First, Y.D.'s testimony did not convey to the jury that Mr. Devincentz had been arrested. As the trial judge pointed out, it did not convey much at all. For example, it did not suggest a consciousness of guilt for the charged crimes or for any other crime. If anything, it suggested that for whatever reason Mr. Devincentz may have gone to a police station on an earlier date, he had gotten "through" it. Second, even assuming that the testimony carried a meaning adverse to Mr. Devincentz so as to bring the *Carter/Rainville* factors into play, the application of those factors demonstrates that the trial court did not abuse its discretion by deciding that a jury

instruction could cure any potential unfairness. The statement was not repeated; the State had instructed Y.D. in advance not to discuss prior allegations and so apparently had not solicited the particular statement; and Y.D. was not the principal witness upon whom the prosecution depended. While K.C.'s credibility was certainly a crucial issue, Y.D.'s report on Mr. Devincentz's comment did not bear on it. Moreover, the trial court's curative instruction was prompt, accurate, and sufficiently general as not to emphasize the testimony. See *Carter*, 366 Md. at 589-91 (describing a proper curative instruction).

In sum, the trial court did not abuse its discretion when it denied Mr. Devincentz's first motion for a mistrial.

Motion Based on CPS Investigator's Testimony

The CPS investigator's testimony conveyed to the jury that K.C. had told her that Mr. Devincentz had urinated on her. Unlike Y.D.'s statement, the CPS investigator's testimony conveyed a clear meaning that was adverse to Mr. Devincentz. The *Rainville/Carter* factors therefore come into play. The first is whether the testimony was repeated or merely an isolated "blurt-out." Although very brief and perhaps appropriately characterized as a "blurt-out," when read on the cold record, the content of the statement could carry a prejudicial effect despite its brevity. However, the trial judge, better-positioned than this Court to gauge the effect of the testimony, found that the isolated nature of the testimony did lessen its prejudicial effect, and we defer to that finding. As to the second factor – whether the State may have elicited the testimony – the trial judge stated his belief that the State had not elicited the testimony. We also defer to that finding.

A third factor is whether the case was "close." As noted by the then-Court of Appeals in the appeal of Mr. Devincentz's first trial, the jury was required to weigh "the relative credibility" of K.C. in light of the defense version of events. 460 Md. at 562. Specifically, the jury was presented with a choice between two narratives: on the one hand, the defense narrative, which was that Mr. Devincentz maintained an orderly and proper household and, to do so, imposed rules against which K.C. constantly rebelled; and, on the other hand, the prosecution narrative, which was that he often looked at pornography on the family computer in the living room, that the house was so crowded that K.C. sometimes slept in the living room, and that he abused her there when her mother was at work. The case was "close" in the sense that the jury had to assess the relative credibility of Mr. Devincentz's primary accuser.

A fourth factor is whether the inadmissible statement was by "the principal witness" on whom the prosecution depended. The CPS investigator was not "the" principal witness, but her testimony otherwise buttressed the testimony of K.C., who was the principal witness for the State.

The third and fourth factors, taken together, indicate that the CPS investigator's inadmissible statement, however brief, posed some potential for prejudice to Mr. Devincentz. However, it is somewhat debatable whether the CPS investigator's statement that K.C. had made an accusation about Mr. Devincentz to the investigator that she had not presented directly to the jury in her own testimony enhanced – or, instead. detracted from – K.C.'s credibility in the eyes of the jury.

The final consideration – the trial court's ability to mitigate the harm with a curative instruction that was timely, accurate, and effective – is perhaps the most important factor in determining whether the trial court was compelled to resort to the extraordinary remedy of declaring a mistrial. In a cautionary instruction to the jury immediately after the defense objection to the inadmissible statement, the trial judge told the jury, in part, that "[t]hat matter has nothing to do with this trial here today and it should not be used or considered by you in any way." That instruction was certainly timely and accurate. Mr. Devincentz disputes whether it was effective.

Mr. Devincentz argues that the instruction conveyed to the jury that the event had in fact occurred and that it became a "matter" – especially, he argues, in light of the fact that the jury had already heard that he had had some other interaction with the police that they had been told to disregard. Those inferences, however, are not the only ones that can be drawn from the trial court's reference to a "matter." While "matter" may signify a court case or proceeding to an attorney, in common parlance it is more often used synonymously with "topic" or "subjects," or even just "words." *See, e.g., Jenkins v. State*, 14 Md. App. 1, 5 (1971) (discussing the "matters and facts" about which the witness in question could testify); *Arundel Corp. v. Green*, 75 Md. App. 77, 84 (1988) (referring to the publication of "defamatory matter"). Thus, like the reference to "Lewisburg" in *Jones v. State*, 310 Md. 569, the trial court's reference to "that matter" perhaps carried a specific meaning to counsel, but it would not have carried that same specific meaning to the jurors. Given that the proper focus is on the meaning conveyed to the jurors, the instruction did not suggest that the CPS investigator was describing another prosecution of Mr. Devincentz. We

conclude that the investigator's "blurt-out," whether viewed by itself or in conjunction with Y.D.'s earlier testimony about Mr. Devincentz's statement to her, was sufficiently mitigated by the court's instruction as to not warrant the extraordinary remedy of a mistrial.

As to both mistrial motions, it is important to note that the trial court, not this Court, had its finger on the pulse of the trial. In deference to the discretion that the trial court exercised based on its observation of the events at trial, we hold that the trial court did not abuse that discretion when it denied the defense motion for a mistrial.

B. Admissibility of K.C.'s Testimony About Effect of Disclosing the Alleged Abuse

At trial, K.C. testified about how she felt after disclosing the alleged sexual abuse to the therapist at the juvenile facility and how that disclosure affected her relationship with her mother. Characterizing that testimony as "victim impact evidence," Mr. Devincentz asserts that the impact of disclosure of the alleged acts on K.C. was not relevant to whether he had committed the crimes. He asserts also that the trial court's admission of the evidence is subject to *de novo* review in this Court because the determination of relevance is a legal question.

1. K.C.'s Testimony

The State elicited K.C.'s testimony that Mr. Devincentz had abused her sexually in various specific ways in his house. K.C. testified that the abuse began when she was about seven years old and continued until she was 14, when she moved to the juvenile facility for a time. While there, K.C. testified, she began to meet with a therapist on the facility's staff. In response to the prosecutor's questions about what she had told the therapist, K.C. stated that she disclosed to the therapist and another staff member that Mr. Devincentz had

sexually abused her. The prosecutor then asked K.C. how she felt after making that revelation :

[Prosecutor]:	How did it make you feel when you told [the therapist]?
[Defense Counsel]:	Objection.
	. . .
The Court:	What's the basis? . . . Come on up.
	. . .
[Defense Counsel]:	Your Honor, the way she felt after she told [the therapist] is not relevant to the issues of this case.
The Court:	It goes to her credibility.
[Defense Counsel]:	Not the way she felt.
The Court:	I'm going to overrule you. I think she can testify . . . how she felt.

The prosecutor then proceeded:

[Prosecutor]:	[K.C.], how did it make you feel when you told [the therapist]?
[K.C.]:	Man, I felt relieved. I felt like I had a sense of humanity, like –
[Defense Counsel]:	Objection. Move to strike.
The Court:	Overruled.
[K.C.]:	If you ever watched those commercials with that elephant sitting on that man's stomach for emphysema, that's exactly how I felt. When that elephant stood up that's exactly how I felt, like it was so much weight off my shoulders that I could just feel it leave my body.

The prosecutor also asked K.C. to describe her relationship with her mother, both when they lived together in Mr. Devincentz's house and when they reunited after K.C. had left the facility where she had spoken with the therapist:

[Prosecutor]:	What was your relationship like with your mom prior to you going to [the facility]?
[K.C.]:	It was horrible. I held a lot of resentment towards her.
[Prosecutor]:	Why?
[K.C.]:	She's my mom. She wasn't supposed to let any of this happen. She was supposed to protect me.
[Defense Counsel]:	Objection.
The Court:	Overruled.
[K.C.]:	She was supposed to keep me safe, and she didn't.
[Defense Counsel]:	Objection, Your Honor. No question on the table. Move to strike.
The Court:	It's a response to the question that was made.
[Prosecutor]:	How is your relationship with her now?
[K.C.]:	I would give her the world. I love her. I forgive her. I realize it wasn't her fault.

2. Admissibility of the Effect on a Minor of Disclosing Prior Sexual Abuse

The initial threshold for the admission of evidence is relevance. Only relevant evidence is admissible. Maryland Rule 5-402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence." Maryland Rule 5-401. Nevertheless, not all relevant evidence is admissible. In particular, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...." Maryland Rule 5-403.

Mr. Devincentz argues that K.C.'s testimony about the effect on her of her disclosure of the alleged abuse was not relevant to the question of whether he had committed the alleged acts, that it served only to arouse in the jury sympathy for K.C. and passion against him, and that the trial court abused its discretion in admitting that testimony over his counsel's objection. He thus challenges both its relevance and, even if relevant, its admissibility.

Relevance, generally and in sex offense cases

Relevant evidence has two components: "'materiality and probative value.'" *Smith v. State*, 423 Md. 573, 590 (2011) (quoting 1 John W. Strong, McCormick on Evidence §185 at 773-76 (4th ed. 1992) ("McCormick")). To assess materiality, the court looks at "'the relation between the proposition for which the evidence is offered and the issues in the case.'" *Id*. To assess probative value, the court looks at "'the tendency of evidence to establish the proposition that it is offered to prove.'" *Id*. The threshold is low; "[i]t is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence." *Id*. at 591.

In particular, "a witness's credibility is **always** relevant." *Devincentz*, 460 Md. at 551 (emphasis in original). Nonetheless, not all testimony on credibility is admissible; a witness may not usurp the fact-finder's role by expressing an opinion as to the truthfulness

of another witness's testimony. *Fallin v. State*, 460 Md. 130, 154 (2018). However, a party seeking to elicit a witness's testimony about the victim's credibility may, after laying a proper foundation, ask the witness to opine on the victim's character for truthfulness. *See Devincentz*, 460 Md. at 544-45. That method is not at issue in this appeal. Additionally, a party may ask the witness to describe the witness's observations of the victim when those observations bear on the veracity of the victim's version of the events. *Brooks v. State*, 439 Md. 698, 732-33 (2014).[8]

The Maryland appellate courts have applied these principles when addressing the relevance and admissibility of a lay witness's testimony about the impact of an alleged sexual assault on the victim. In addressing the admissibility of a nurse's observations of the victim's physical state after an alleged rape, the Supreme Court (then known as the Court of Appeals) concluded that the nurse's testimony was properly admitted because it tended to corroborate other evidence, including the victim's testimony. *Brooks*, 439 Md. at 733. Additionally, this Court has addressed the relevance of lay testimony about a victim's behavior or mental condition soon after the alleged sexual assault and in the weeks following it. *See Parker v. State*, 156 Md. App. 252, 273 (2004). There, the Court held that the victim's grandmother's testimony about unusual changes in the victim's behavior

[8] Yet another method, also not at issue in this case, is to elicit expert testimony on whether the victim's behavior or demeanor supported the proposition that the alleged sexual offense occurred. *See Brooks*, 439 Md. 733 (citing *Hall v. State*, 107 Md. App. 684, 693–95, *cert. denied*, 342 Md. 473 (1996) for the proposition that "although an expert may not testify as to personal belief in the testimony of another witness, an expert may testify whether the expert's observations are consistent with the disputed testimony"); *see also, e.g., Hutton v. State*, 339 Md. 480, 504 (1995) (holding that experts had impermissibly commented on the victim's credibility).

in the weeks after the alleged rape was relevant to the issue of whether the victim had consented to the act. 156 Md. App. at 273-74.

As this Court discussed in *Parker*, courts in other states have also found testimony about the long-term effects of the alleged sexual assault on the victim's behavior and mental well-being to be relevant when the defendant denies the act or asserts that the victim consented. In one example, the Supreme Court of South Carolina addressed "the issue of whether the emotional trauma testimony of a rape victim which allegedly resulted from the attack is relevant, and if so, admissible into evidence." *State v. Alexander*, 401 S.E.2d 146, 148 (1991). There, the victim of the alleged rape testified that since the assault she had slept poorly, lost her appetite, was upset easily, could not concentrate at work, and had bought a gun to protect herself. The defendant asserted that the victim had consented to the act. Holding that the evidence was admissible, the court stated that the victim's testimony about her "mental trauma is relevant to prove the elements of criminal sexual conduct, including the lack of consent. Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred." *Id*. at 149. In another example, a Missouri appellate court upheld the trial court's admission of the victim's mother's testimony that her daughter had nightmares for a year after the incident, still had trouble sleeping at night, and was afraid to be alone at night. *State v. Ogle*, 668 S.W.2d 138, 139. (Mo. Ct. App. 1984). The court observed that "[W]here there is a question whether the complaining witness was forcibly raped, her condition long after the

rape may be relevant. That is particularly true where, as here, the defendant contends that the complaining witness lied about the rape." *Id*. at 141.[9]

In summary, a trial court's determination of whether evidence meets the definition of "relevant evidence" under Rule 5-401 is a legal determination, subject to *de novo* review. *DeLeon v. State*, 407 Md. 16, 20-21 (2008). To assess the relevance of a particular item of evidence, the court must determine whether it is offered for a proposition that is of consequence to the issues in the case (materiality) and then whether it tends to prove that proposition (probative value). When doing that, the court looks at the evidence, whether direct or circumstantial, in the context of other evidence, rather than in a vacuum. *See, e.g., Molina v. State*, 244 Md. App. 67, 127 (2019) ("The significance of a single strand of

[9] *See also, e.g.*, *People v. Perez*, 2015 Guam 10, ¶ 39, 2015 WL 1742843*8 (Guam Apr. 9, 2015) (upholding admission of the victim's testimony about seeking counseling services a year after the charged sexual assaults); *Dickerson v. Commonwealth*, 174 S.W.3d 451, 471-72 (Ky. 2005) ("The evidence of [the victim's] emotional injury was directly relevant to prove that she was sexually assaulted" and "became even more relevant when Appellant denied that the assault occurred"); *People v. Coleman*, 768 P.2d 32, 48-49 (Cal. 1989) ("Statements of a complaining witness to a counselor describing emotional and psychological trauma suffered by the witness following an alleged rape are admissible as circumstantial evidence on the question whether the defendant had a reasonable good faith belief that the witness had consented to his act."); *State v. Burke*, 719 S.W.2d 887, 889 (Mo. Ct. App.1986) ("[E]vidence of the complainant's physical and psychological changes is relevant to prove the elements of the sexual offense itself and, thus, may be admitted to show the offense did in fact occur."); *State v. Cummings*, 716 P.2d 45, 47-48 (Ariz.Ct.App.1985) (holding that the victim's testimony that he had tried to commit suicide and was hospitalized in a psychiatric institution because "he couldn't handle what [the defendant] had done to [him]" was relevant to the defendant's denial of sexual contact with the victim because it tended to support the victim's testimony that the alleged incident took place); *State v. Johnson*, 637 S.W.2d 157, 161 (Mo.App.1982) (where the defense was that the two sexual assault victims had consented to the conduct, one victim's testimony that she had moved out of state and the other's testimony that she had dropped out of school were relevant on that issue because "[i]t was inferable from the testimony that these major voluntary changes in the victims' lives were made because of the sexual activities.").

circumstantial evidence may be unclear when isolated from the larger tapestry."). In sexual assault cases in which the defendant denies the act or claims that the victim consented, courts have often found the effect of the alleged act on the victim to be both material and probative.

If the court finds the evidence relevant, the court must next address its admissibility. That step requires the court to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice.

Probative value vs. unfair prejudice

In determining whether particular evidence is admissible under Rule 5-403, the trial court must balance "the proponent's need to introduce the challenged evidence against the danger that this evidence would unfairly prejudice the party objecting to it." Joseph F. Murphy, Jr., et al., Maryland Evidence Handbook §506[B] at 230 (5th ed. 2020). The test focuses on whether the claimed prejudice is "unfair." The "danger of '*unfair*' prejudice" outweighs its probative value "when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Id*.; *see also Odum v. State*, 412 Md. 593, 615 (2010) (quoting the same language from Joseph F. Murphy, Jr., et al., Maryland Evidence Handbook §506[B] at 229 (3d ed. 1993 and Supp. 2007)).

The trial court's weighing of the probative value of the evidence against the danger of unfair prejudice under Rule 5-403 is discretionary, subject to review for abuse of discretion. In that regard, "[w]here evidence is relevant, this Court gives wide latitude to judges' decisions on its admissibility." *DeLeon*, 407 Md. at 21.

3. Analysis

In *State v. Ogle*, 668 S.W.2d at 141, the Missouri Court of Appeals observed that a victim's condition "long after" a sexual assault may be relevant when there is a question about whether the assault occurred, particularly in a case where the defendant has contended that the victim lied about the assault. In this case, Mr. Devincentz's defense, as articulated in his counsel's opening statement, was that the alleged sexual acts never occurred and that K.C. had lied about them. As in *Ogle* and the other cases cited above, K.C's mental state, including the effect on her of disclosing the abuse to the therapist after years of silence and the change in her relationship with her mother after the abuse had been reported and her mother had left Mr. Devincentz, was both material to, and probative of, the proposition that the abuse had occurred.

The next question is whether the probative value of K.C.'s testimony on these two topics was outweighed by the risk that its admission would be "unfairly prejudicial" to Mr. Devincentz. At trial, the defense objected on relevance grounds to K.C.'s testimony about her sense of relief after disclosing the abuse. As to that testimony, the defense did not assert that the probative value of that evidence was outweighed by its prejudicial effect. When a specific ground for an objection to evidence is made, all other grounds are deemed to have been waived. *See, e.g.*, *Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal.").

In any event, whether or not the testimony was "greatly" prejudicial, it does not appear to be "unfairly" prejudicial in light of its probative value. The context in which K.C. gave the testimony resolves that issue. The testimony came right after she had testified, in answer to several questions to which the defense had not objected, that she had held "a lot of resentment" towards her mother while they both lived in Mr. Devincentz's house, that their relationship had been "horrible" while K.C. was living there, and that their relationship was "a lot better," "good," after K.C. left the facility and began living with her mother in a separate household. K.C.'s elaboration on that testimony was not so inflammatory as to deprive the defendant of a fair trial, and, as noted above, it had probative value because it tended to prove her mental state both during and after the alleged sexual abuse.

In sum, the trial court neither erred when it found K.C.'s testimony about the effects of disclosing the sexual abuse to be relevant nor abused its discretion in finding that testimony to be admissible.

C. Admissibility of the Therapist's Testimony About the Change in K.C.'s Behavior

K.C.'s therapist testified that she met with K.C. four or five times a month while K.C. was at the facility. The therapist said that she observed changes in K.C.'s behavior after K.C told her during September 2015 about the alleged abuse. The therapist described the disclosure as removing a "weight" from K.C.'s shoulders. Mr. Devincentz argues that the therapist's testimony was "too ambiguous and equivocal to be relevant." In the alternative, he posits that the therapist's testimony embodied a lay opinion probative of

K.C.'s credibility and that, as such, it was inadmissible as a conclusory assessment of an issue within the jury's domain.

1. Defense Motion *in Limine*

On the morning of the first day of trial, the defense asked the trial court to exclude testimony by the therapist about changes in K.C.'s behavior after K.C. made the disclosure to the therapist:

> [Defense Counsel]: Your Honor, [the therapist] . . . will be testifying. She is the therapist who [K.C.] made these disclosures to, and she was the reporting party. I noticed in her testimony . . . after she testified about the disclosures she went on to testify about what she perceived was a change of behavior in [K.C.]. I would seek to exclude anything after [K.C.] makes the disclosures and what action she took and what she did. I think anything else following that disclosure is not relevant. She doesn't know. She's made this opinion that -- she posits this opinion that [K.C.'s] behavior changed. We don't know why [K.C.'s] behavior changed. [K.C.'s] behavior could have changed for a multitude of reasons. I don't think that she's in a position to put forth that testimony; and . . . I really just think it's not relevant. She's there. She's the reporting party. [K.C.] made the disclosures to her. All of that is relevant. But what happened following that disclosure is not relevant, and she's just speculating.
>
> [Prosecutor]: Your Honor, she's not stating why her behavior changed. She's simply stating that she observed that [K.C.'s] behavior changed after she made this disclosure.
>
> [Defense Counsel]: It's not relevant.
>
> The Court: I'll deny your motion at this point. I'll let her testify factually as to what she observed.

2. Defense Objection at Trial

The therapist testified on the second day of trial, after K.C. On direct examination, the therapist testified that she worked as a therapist at the facility while K.C. lived there, that she met with K.C. four or five times a month, and that K.C. disclosed to her that Mr. Devincentz had sexually abused her for years. The prosecutor then asked the therapist, "Can you describe [K.C's] demeanor after she made the disclosure?" Defense counsel renewed her motion *in limine*:

> [Defense Counsel]: This is my original motion *in limine* to exclude any mention of her behavior following the disclosure. Once she made the disclosure, that's all that's relevant here. . . .
>
> . . .
>
> The Court: Her credibility is an issue. I mean, why wouldn't this possibly have some bearing on that?
>
> [Defense Counsel]: Just because her behavior changed doesn't mean -- it doesn't go to her credibility.
>
> [Prosecutor]: It does go to her credibility.
>
> [Defense Counsel]: It could change for many reasons. Her behavior could've changed because now she's finally getting back at her parents. Maybe it could've changed because now she's got attention from people. There's a lot of reasons her behavior could've changed.
>
> [Prosecutor]: That's all fodder for cross examination. She can ask her those questions.
>
> The Court: I'll overrule. Again, I think it's proper at this point.

3. The Therapist's Testimony

The prosecutor asked the therapist to "explain [her] observations of how [K.C.] changed after [K.C.] made the disclosure on September 17, 2015." The therapist responded:

> She was a completely different kid. It almost seemed like a weight had been lifted off her shoulders. I'm not saying she never got angry again because kids are going to make you angry when you're living with a bunch of kids. She handled it completely differently. To my knowledge, she didn't have any[]more violent outbursts. She would remove herself from situations, take a walk, go to her bedroom, and then later ask to speak with me or a teaching parent that she felt comfortable with and talked her feelings out. She would journal, write her feelings out. She would talk more about her past in therapy and how it affects her and how it affects the way she handles situations and how she wants to move forward doing things differently.

Defense counsel moved to strike. The trial court denied the motion.

4. Applicable Law

As discussed in Part II.B of this opinion above, courts have often admitted evidence of an alleged victim's post-assault behavior or condition, whether offered through the victim's own testimony or that of another witness, to establish that an assault occurred when the defendant denies that the incident occurred or contends that the alleged victim consented to the act. *See Parker*, 156 Md. App. at 271 (noting that "evidence of a victim's conduct following a sexual assault has been permitted in other states to demonstrate that the attack did occur or to show a lack of consent" and holding that the trial court properly admitted the victim's grandmother's testimony that the victim's behavior changed abruptly after the rape).

With regard to whether the probative value of the evidence was outweighed by its prejudicial effect, the test is whether the claimed prejudicial effect was "unfair" – a decision of a trial judge that is reviewed under an abuse of discretion standard. *State v. Simms*, 420 Md. 705, 725 (2011).

5. Analysis

The trial court did not err in deeming therapist's testimony concerning the change in K.C.'s behavior after K.C. disclosed the alleged abuse relevant to the question of whether the abuse had occurred. As discussed above in the context of K.C.'s own testimony, evidence about changes in a victim's behavior after the alleged sexual assault can tend to prove that the crime occurred when the defendant denies that the act occurred or claims that the victim consented. *See Parker*, 156 Md. App. at 271-73. Further, the trial court did not abuse its discretion when it found that the probative value of the testimony outweighed its prejudicial effect. Although the evidence was prejudicial to Mr. Devincentz's defense that K.C. had lied about his conduct – as any probative evidence contrary to that defense would be – it was not so inflammatory as to overwhelm the jury's ability to assess the evidence fairly and rationally. *See Odum*, 412 Md. at 615. Therefore, it did not "unfairly" prejudice Mr. Devincentz.

Alternatively, Mr. Devincentz asserts that the therapist's testimony about her observations of K.C. was inadmissible under *Hutton v. State*, 339 Md. 480 (1995), as a lay opinion about K.C.'s veracity. The defense did not assert that argument at trial, and the record does not support it. The therapist was not asked for her opinion, and did not give an opinion, on whether the behavior changes that she observed proved K.C.'s veracity.

Instead, the therapist briefly described her observations of K.C.'s behavior before the disclosure and then after the disclosure. The principles set forth in *Hutton* do not apply to this case.

In sum, the trial court's admission of the therapist's testimony about her observations of K.C.'s behavior before and after K.C. disclosed the alleged sexual abuse does not provide a basis for reversing Mr. Devincentz's convictions.

III

Conclusion

For the reasons explained above, we hold that:

1. The trial court did not abuse its discretion when it denied the defense's motions for a mistrial.

2. The trial court did not err when it allowed K.C. to testify about the effect on her of telling her therapist that Mr. Devincentz had sexually abused her and about the effect of that disclosure on her relationship with her mother.

3. The trial court did not abuse its discretion when it admitted the therapist's testimony that K.C.'s behavior changed after K.C. disclosed the alleged abuse to her.

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