Circuit Court for Saint Mary's County
Case No. C-18-CR-22-000237

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0885

September Term, 2023

BRIAN STEVEN SPICUZZA

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Zic,

JJ.

Opinion by Nazarian, J.

Filed: February 14, 2025

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

During its opening statement in Brian Spicuzza's trial for possession of child pornography, the defense told the jury that "[t]his case [was] about data and assumptions." The Circuit Court for Saint Mary's County later allowed the State to rebut the implication that detectives operated on "assumptions" rather than a thorough investigation by having Yvonne Dawkins, a registered nurse, testify that she reviewed photos for them before they brought charges. While testifying, Nurse Dawkins said that she reviewed "more than thirty" photos for the detectives. Mr. Spicuzza argues that this portion of her testimony was irrelevant to rebutting the defense's comments and constituted improper propensity evidence because it implied Mr. Spicuzza had other "lewd" photos on his devices. We disagree on both grounds and affirm.

I. BACKGROUND

On February 23, 2022, while conducting a search warrant in connection with a separate investigation into Mr. Spicuzza, detectives recovered eight electronic devices from his apartment: (1) a Secure Digital ("SD") card—a type of memory card used in cameras and other devices—a spy camera, and a microSD adapter; (2) a black Galaxy Samsung cellphone; (3) a Hewlett-Packard laptop; (4) a blue Galaxy Samsung cellphone; (5) a Kodak camera with no SD card; (6) an Apple MacBook laptop; (7) an Intel dual wireless tower; and (8) a dashboard camera. A computer forensic analyst later extracted data and information from those devices and flagged several images for the sheriff's department as potential child pornography. Detective Bare, one of the officers investigating Mr. Spicuzza, then showed several of those photos to Nurse Dawkins, a pediatric forensic

nurse, to get her opinion on the ages of the individuals photographed (*i.e.*, whether they appeared to be younger than sixteen years old). As a result of this investigation, the State charged Mr. Spicuzza with nine counts of possession of child pornography, each count associated with a different photo.

Before trial, the defense filed a motion to exclude Nurse Dawkins's expert testimony. They argued that the Tanner Scale (a scale that measures physical development in children), about which Nurse Dawkins would testify, is not a qualifiable "science" and that the issue of age should be left to the jurors. The State withdrew the expert notice and explained that they would only have Nurse Dawkins testify on rebuttal, if at all. The trial court reserved ruling on the scope of Nurse Dawkins's potential testimony.

On the morning of the first day of trial, December 13, 2022, the defense filed a new motion to exclude Nurse Dawkins's testimony. They argued that Nurse Dawkins lacked personal knowledge and that her non-expert opinion would neither assist the jury in understanding her testimony nor help the jury evaluate the evidence, as required under Md. Rule 5-701. The court chose to address the motion later to give the State time to review it.

During their opening statement on the first trial day, the defense commented that this case was built on "mistakes" and "assumptions":

> [DEFENSE COUNSEL]: Mistakes happen. Mistakes can happen when you make assumptions about things, and when you dig a little deeper and look a little closer, things are not always as they seem. . . . This case is about data and assumptions. . . . [Y]ou won't hear anyone come in and testify that these images were traced or tracked and that they have identified the--the individuals in the photos and have a birthday. You won't hear that these images have been verified

> by any sort of outside organization as definitively being child pornography because they are individuals under the age of 16, and that's important.

The State made no objection to these comments.

After two detectives and the forensic analyst testified for the State, the State planned to call Nurse Dawkins as their final witness. At that point, the court sent the jury home for the day and scheduled oral argument for the next morning to hear the defense's motion to exclude her testimony. After oral argument, the court granted the defense's motion and excluded Nurse Dawkins's testimony entirely.

Immediately after the court gave this ruling from the bench, the State asked for permission to have Nurse Dawkins testify *only* about her involvement in the case for the purpose of rebutting the defense's comments in opening statement. The court granted this request, limiting Nurse Dawkins's testimony strictly to the fact that she reviewed photos for Detective Bare—no opinion testimony allowed. Nurse Dawkins then testified to her brief participation in the investigation:

> [STATE]: Would you please, again, just state your name for the record.
>
> [NURSE DAWKINS]: Yvonne Dawkins.
>
> [STATE]: And where are you currently employed?
>
> [NURSE DAWKINS]: Calvert Health Medical Center.
>
> [STATE]: And what is your duty there?
>
> [NURSE DAWKINS]: I am an emergency room nurse.
>
> [DEFENSE COUNSEL]: Objection.
>
> [COURT]: Overruled. Go ahead.
>
> [STATE]: And how long have you been a registered nurse?
>
> [NURSE DAWKINS]: Since 2005.

> [STATE]: So, about 17 years?
>
> [NURSE DAWKINS]: Correct.
>
> [DEFENSE COUNSEL]: Please note our objection, Your Honor.
>
> [COURT]: Yes.
>
> [DEFENSE COUNSEL]: Your Honor, can we have a continuing objection. Thank you.
>
> [STATE]: On May 24th, 2022, did you meet with Detective Bare to review some photographs?
>
> [NURSE DAWKINS]: I did.
>
> [STATE]: And do you recall how many photographs you –
>
> [NURSE DAWKINS]: I don't know exactly how many. I know there was more than 30.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [COURT]: Overruled.
>
> [STATE]: And reviewing these photographs, did that conclude your involvement in this case?
>
> [NURSE DAWKINS]: Yes.
>
> [STATE]: Your Honor, I have nothing further at this time.
>
> [COURT]: Any cross?
>
> [DEFENSE COUNSEL]: No, Your Honor. . . .

The State rested after Nurse Dawkins's testimony.

At the end of the trial, the jury found Mr. Spicuzza guilty of three out of the nine counts. The court sentenced him to five years' imprisonment for each count (fifteen years in total) and suspended the three sentences to 374 days each. The court ordered these

sentences to run concurrent to one another but consecutive to his sentences in a separate criminal case.[1] The court also ordered five years of probation upon his release from prison.

II. DISCUSSION

Mr. Spicuzza raises one question on appeal: Did the trial court err in admitting Nurse Dawkins's testimony about the number of photos she reviewed for the detectives?[2] He argues *first* that Nurse Dawkins's testimony was irrelevant because without the inference that she offered an opinion on the ages of the individuals in the photos—which she was not permitted to discuss during her testimony—the fact that Detective Bare showed her over thirty photos did not rebut any implications in the defense's opening statement about the quality of the investigation. *Second*, Mr. Spicuzza argues that Nurse Dawkins's testimony constituted inadmissible propensity evidence because it implied that the photos were "concerning enough" to seek a healthcare professional's opinion.

[1] Mr. Spicuzza was convicted of sexual abuse of a minor, second-degree rape, and third-degree sex offenses in a separate criminal case—the case in which the search warrant originated—in the Circuit Court for Saint Mary's County.

[2] Mr. Spicuzza phrased the Question Presented as follows:

> Whether the court erred under rules prohibiting irrelevant other crimes evidence by permitting jurors in this nine-count possession of child pornography trial to hear police consulted with a nurse on "more than thirty" photographs found.

The State phrased the Question Presented as follows:

> Did the trial court properly allow a nurse to testify to the number of photographs she reviewed at the request of a detective, or, in the alternative, was any error harmless?

In response, the State contends that Nurse Dawkins's testimony was relevant to rebut the defense's opening statement that this case was based on "mistakes" and "assumptions," which implied that the investigation was insufficient. The State argues further that Nurse Dawkins's testimony did not amount to evidence of "bad acts" because a possible inference that Mr. Spicuzza had other "lewd" photos, but not necessarily other photos of child pornography, on his devices is not the kind of evidence prohibited under Maryland Rule 5-404(b).

We agree with the State that Nurse Dawkins's testimony was relevant. The defense's comments during opening statements, although limited, implied that the investigation had failed to uncover key facts and that the police and the State based Mr. Spicuzza's charges on "assumptions" rather than a thorough investigation. The State was permitted to rebut a claim of poor investigatory work, and the trial court restricted Nurse Dawkins's testimony properly to respond just to that argument.

We agree with the State as well that Nurse Dawkins's testimony was not evidence of "bad acts." Although it is possible her testimony could have caused a juror to infer that Mr. Spicuzza had several other "lewd" pictures on his devices, her testimony did not compel this conclusion, nor was it the only possible (or likely) conclusion the jurors could draw. We affirm the circuit court's decision to admit her testimony.

A. Nurse Dawkins's Testimony Was Relevant Because Mr. Spicuzza "Opened The Door" To Rebuttal Testimony About The Quality Of The Investigation.

Mr. Spicuzza's first argument centers on whether Nurse Dawkins's testimony was relevant in this case. 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." Md. Rule 5-401. Generally, "all relevant evidence is admissible," Md. Rule 5-402—unless "its probative value is substantially outweighed by the danger of unfair prejudice" or other considerations under Md. Rule 5-403—and "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. Under the "open door" doctrine, however, irrelevant evidence may become admissible if prior admissible evidence generated an issue, or the court admitted inadmissible evidence over objection. *Clark v. State*, 332 Md. 77, 84–85 (1993), *superseded by rule*, Md. Rule 5-403, *on other grounds as recognized in State v. Heath*, 464 Md. 445 (2019).

In this case, the State purports that the relevancy of Nurse Dawkins's testimony stems from an issue that the defense generated during their opening statement (*i.e.*, whether the officers conducted a thorough investigation). Therefore, the analysis of this issue is two-fold: (1) Did Mr. Spicuzza open the door to rebuttal evidence about the quality of the investigation; and (2) Did Nurse Dawkins's testimony satisfy the admissibility requirements of Maryland Rule 5-403?

1. Mr. Spicuzza opened the door.

The first question is whether Mr. Spicuzza opened the door to testimony about the thoroughness of the police department's investigation. We review issues of relevancy *de*

novo, including whether a party "opened the door" to otherwise irrelevant evidence. *State v. Robertson*, 463 Md. 342, 353 (2019); *see also State v. Heath*, 464 Md. 445, 457 (2019) ("Whether an opening the door doctrine analysis has been triggered is a matter of relevancy which this Court reviews *de novo*.").

The "open door" doctrine is "a rule of expanded relevancy" that "authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection." *Clark*, 332 Md. at 84–85; *see also* Joseph F. Murphy, Jr. & Erin C. Murphy, *Maryland Evidence Handbook* § 106[D][1], at 40 (5th ed. 2020) ("The introduction of admissible evidence may well 'open the door' to the introduction of evidence that would have been otherwise inadmissible."). This doctrine applies not only to evidence presented during a party's case in chief but also to comments made during opening statements. *Heath*, 464 Md. at 461 ("[A] comment in opening may 'open the door' to evidence offered by the opposing party that previously would have been irrelevant, but has become relevant."); *see also Little v. Schneider*, 434 Md. 150, 161 (2013) ("[T]he doctrine of 'opening the door' applies equally in opening statements, witness examination, and closing arguments.").

The evidence at issue here relates to the detectives' investigation. Generally, "[t]he jury . . . has no need to know the course of an investigation unless it has some direct bearing on guilt or innocence." *Zemo v. State*, 101 Md. App. 303, 310 (1994). But if "the defense accuses the investigators of doing a 'sloppy job,'" course-of-investigation evidence may

become relevant and admissible to rebut that accusation. *Casey v. State*, 124 Md. App. 331, 348 (1999). In *Freeman v. State*, 259 Md. App. 212 (2023), *aff'd*, 487 Md. 420 (2024), for example, the defendant was charged with murder, among other offenses, for the shooting death of the victim. *Id.* at 220–21. The lead detective testified for the State and, during cross examination, the defense asked several questions suggesting that he had failed to conduct a thorough investigation into the murder weapon and other potential suspects:

> [D]id you follow up with the detectives, or whoever is investigating [an unrelated car jacking involving the murder weapon] in Prince George's County, to figure out who was involved in that armed carjacking? . . . Did you make any attempts to contact the D.C. police to investigate who had used [the murder weapon in the unrelated shooting]? . . . As the lead homicide investigator, detective, in this case, you did not contact, or call, or talk to [a potential suspect] about any of these text messages, correct? . . . There was no follow up with [other potential suspect], correct?

Id. at 246 n.15.

The trial court determined, and this Court agreed, that the defense had opened the door to additional testimony on redirect as to why the detective did not further investigate the unrelated crimes or other potential suspects. *Id.* at 247–49. In affirming the trial court's decision to admit the rebuttal testimony, this Court acknowledged that "[o]rdinarily, evidence concerning the course of a police investigation is problematic because of the likelihood such evidence is either irrelevant or may include inadmissible hearsay." *Id.* at 249. In that case, however, we concluded that the defense's cross-examination of the detective generated an issue about the thoroughness of the investigation; the court limited the rebuttal testimony sufficiently; and the court gave a limiting instruction to the jury that

the conversations discussed on redirect were not offered for their truth but only to explain why the detective didn't follow those leads. *Id.* at 251. Therefore, we decided the detective's rebuttal testimony had been admitted properly. *Id.*; *see also Tu v. State*, 97 Md. App. 486, 502–03 (1993), *aff'd*, 336 Md. 406 (1994), *superseded by rule*, Md. Rule 5-701, *on other grounds as recognized in Ragland v. State*, 385 Md. 706 (2005) (detective permitted to testify as to investigative steps taken because defense accused detective of failing to follow up with airline personnel regarding victim's whereabouts following her disappearance).

Although the defense's comments during their opening statement in this case didn't attack the quality of the investigation as explicitly as the questions in *Freeman* had, the defense's comments did signal a lack of thoroughness in the investigation:

> [DEFENSE COUNSEL]: Mistakes happen. Mistakes can happen when you make assumptions about things, and when you dig a little deeper and look a little closer, things are not always as they seem. . . . This case is about data and assumptions. . . . [Y]ou won't hear anyone come in and testify that these images were traced or tracked and that they have identified the--the individuals in the photos and have a birthday. You won't hear that these images have been verified by any sort of outside organization as definitively being child pornography because they are individuals under the age of 16, and that's important.

The State didn't object at the time. But in response to the defense's motion *in limine* to exclude Nurse Dawkins's testimony, the State argued that (1) Nurse Dawkins should be allowed to provide a lay opinion as to the ages of the individuals in the photos, and (2) she should be allowed to testify about her role in the investigation as well as her opinions on

the individuals' ages in order to rebut the defense's "assumptions" comment. The court granted the defense's motion *in limine* initially but later granted the State's request to allow Nurse Dawkins to rebut the defense's comments without getting into her opinion:

> [COURT]: [A]s to the issue of relevance, I'm allowing Ms. Dawkins to testify because she was consulted by the police officer. I'm not letting her get into any of her findings or reasons for what she did or what she believes these pictures show or not. We're not going to get into her expertise, but I think that the fact that the police officer did contact her makes her part of the case for the purposes of making sure there's no missing witness issue or confusion of the jury as to why she wasn't put on the stand.

The defense is correct that the "mistakes" and "assumptions" comments during their opening were "very general statements." And the defense is well within their rights to point out gaps in the State's evidence as a litigation strategy. The comments that pushed this into the realm of warranting rebuttal course-of-investigation evidence, though, are those that specifically (albeit impliedly) attacked the investigatory process: the images were not tracked and traced back to the individuals, and the images were not verified by a third-party organization as child pornography. These comments suggested that the investigating officers failed to confirm their suspicions before bringing charges and acted on assumptions rather than on an in-depth investigation. We agree with the circuit court that the defense opened the door for limited rebuttal testimony about the investigatory process.

2. Nurse Dawkins's testimony satisfies the Rule 5-403 balancing test.

The next question is whether Nurse Dawkins's testimony satisfied the balancing test of Maryland Rule 5-403. Unlike the *de novo* standard used above, we review a trial court's

decision to admit evidence for abuse of discretion. *Heath*, 464 Md. at 458 ("Whether responsive evidence was properly admitted into evidence is reviewed for an abuse of discretion."). "'[A]n abuse of discretion exists when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to guiding rules or principles.'" *Id.* (*quoting Robertson*, 463 Md. at 364). Under Rule 5-403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Relevant rebuttal evidence may also be excluded if it is not proportionate to the evidence that opened the door. *Heath*, 464 Md. at 463 ("[I]n admitting evidence under the 'open door' doctrine, 'the remedy must be proportionate to the malady . . . .'" (*quoting Terry v. State*, 332 Md. 329, 338 (1993))).

The defense argued before the trial court that Nurse Dawkins's testimony posed every danger enumerated in Rule 5-403, particularly if she were to provide her opinion. The trial court granted the motion to exclude because the ages of the individuals was an issue that "d[id] not require an expert" and should be determined by the jury. The court also believed that Nurse Dawkins's testimony would effectively be expert testimony in lay clothing. Overall, the court's determination suggests (1) there was no probative value in Nurse Dawkins's *opinion*, and (2) there was a possibility of unfair prejudice if Nurse Dawkins were to provide her opinion as a healthcare professional.

The State's later request to offer Nurse Dawkins's testimony only for rebuttal is not covered by that analysis, though. The court determined separately that her testimony would be probative on the issue of the quality of the investigation. Although the court didn't make express findings as to whether this limited testimony posed any of the risks listed in Rule 5-403, the trial court is "presumed to know and properly apply the law," and "is not required to 'spell out every step in weighing the considerations that culminate in a ruling.'" *Freeman*, 259 Md. App. at 236 (*first quoting Lamalfa v. Hearn*, 457 Md. 350 (2018); *then quoting Wisneksi v. State*, 169 Md. App. 556 (2006), *aff'd*, 398 Md. 578 (2007)). "A trial court's findings are sufficient when 'the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion." *Id.* (*quoting Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003)).

We hold that the record supports the trial court's decision to allow Nurse Dawkins to testify as she did. Although the State mentioned in their opening statement that Detective Bare consulted with Nurse Dawkins, opening statements are not evidence, and Nurse Dawkins's involvement was not discussed otherwise in the evidence presented to the jury. Also, Nurse Dawkins's testimony consisted of short answers to seven questions on direct examination and no cross examination. Thus, there was no danger of needless cumulation of evidence, undue delay, or waste of time.

There also was no danger of misleading the jury or confusing the issues. In fact, considering that the State mentioned Nurse Dawkins during their opening statement,[3] the trial court admitted her rebuttal testimony to "mak[e] sure there's no missing witness issue or confusion of the jury as to why she wasn't put on the stand." Nurse Dawkins testified as to her minor role in the case, provided no opinions or findings, and raised no new issues by testifying. And although closing arguments aren't evidence, the court instructed the jurors that opening statements and closing arguments are "intended . . . to help [the jurors] to understand the evidence and to apply the law." With that in mind, the State explained during closing argument why they had Nurse Dawkins testify:

> [STATE]: [I]n case you were wondering why Yvonne Dawkins was called. It was because of the argument that was made. Even though our arguments are not evidence and you are only to consider the evidence in the case, the State felt it was necessary to respond [to the defense's comments] that this case was [based] on assumptions and mistake of fact.

This clarification would have dispelled any potential confusion.

The defense also argued that Nurse Dawkins's testimony, even when limited to rebuttal, still carried the potential of unfair prejudice. Of course, "[a]ll evidence, by its

[3] The State laid out the steps of the investigation for the jury during their opening statement:

> [STATE]: Lee Burns [the computer forensic analyst] . . . marked several files of interest and sent the extractions back to the St. Mary's County Sheriff's Office, Detective Behr (sic), who then consulted with Yvonne Dockens (sic), a registered nurse in the area, and then the charges were put forth for nine counts of the child pornography.

nature, is prejudicial," *Williams v. State*, 457 Md. 551, 572 (2018), and "prejudicial evidence is not excluded under Rule 5-403 only because it hurts one party's case." *Montague v. State*, 471 Md. 657, 674 (2020); *see also Burris v. State*, 435 Md. 370, 392 (2013) ("'[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.'" (*quoting Odum v. State*, 412 Md. 593, 615 (2010))). Instead, evidence is "prejudicial" under Rule 5-403, "when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Smith v. State*, 218 Md. App. 689, 705 (2014) (*quoting Hannah v. State*, 420 Md. 339, 347 (2011) (internal quotations omitted)).

Here, the defense seems concerned that the jurors would infer from Nurse Dawkins's testimony that the police contacted an expert (Nurse Dawkins) to opine on the ages of the individuals in the photos and that, because the State brought charges for these nine photos, she must have concluded all the individuals were under sixteen. The court, however, limited Nurse Dawkins's testimony properly to rebuttal, and her testimony only "tend[ed] to prove the fact" that the detectives conducted a thorough investigation. *Id.* The court allowed Nurse Dawkins to say that she was a Registered Nurse at Calvert Health Baptist Memorial but prohibited the State from going any further into her qualifications or professional background or title. The court also restricted Nurse Dawkins's testimony to what she did for the detectives, disallowing any testimony about her opinions or findings after reviewing the photos. We conclude these restrictions were sufficient to prevent the expert-testimony-in-lay-clothing concern expressed by the defense and the court.

Additionally, we find that the court's instructions to the jury that they "should consider [the evidence] in the light of [their] own experiences," and "draw any reasonable conclusion from the evidence that [they] believe to be justified by common sense and [their] own experiences," reduced the probability that the jurors would rely on inferences as opposed to their own judgment. Overall, none of the dangers in Rule 5-403 outweighed the probative value of Nurse Dawkins's testimony, which was to show that the investigation was thorough.

Finally, Mr. Spicuzza argues that Nurse Dawkins's testimony went beyond the scope of rebutting the defense's comments in opening when she testified to the number of photos she reviewed for Detective Bare. We disagree. Again, "in admitting evidence under the 'open door' doctrine, 'the remedy must be proportionate to the malady . . . .'" *Heath*, 464 Md. 463 (*quoting Terry*, 332 Md. at 338). The number of photos Nurse Dawkins reviewed is relevant to the thoroughness of the investigation, and at no point did she testify about her opinion of the individuals in the photos. Because the court limited Nurse Dawkins's brief testimony to her involvement in the investigation and prohibited testimony regarding her opinion, we conclude that her testimony was proportional to the comments that opened the door to course-of-investigation evidence. Therefore, we hold that Nurse Dawkins's testimony was relevant and admissible.

B. Nurse Dawkins' Testimony Was Not Improper Propensity Evidence Because It Was Not Evidence Of "Other Acts."

Mr. Spicuzza also argues that Nurse Dawkins's statement that she reviewed over thirty photos for Detective Bare amounted to "other acts" evidence prohibited by Maryland

Rule 5-404(b). The question of whether "other acts" evidence is admissible is answered through a three-step analysis. *State v. Faulkner*, 314 Md. 630, 634–35 (1989). We don't reach that analysis here, though, because this issue is resolved by answering a preliminary question: Is a potential inference that Mr. Spicuzza had other "lewd" photos on his devices evidence of "other acts"? We hold that it isn't.

Under Maryland Rule 5-404(b), "[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith." Md. Rule 5-404(b). Notably, the prohibition is not limited to crimes or "bad" acts. It also encompasses "other acts" that are "not necessarily criminal, [but] tend[] to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg v. State*, 355 Md. 528, 547–49 (1999). Simply put, context matters. *See, e.g.*, *Whittlesey v. State*, 340 Md. 30, 58 (1995) (walking behind woman while carrying a knife isn't misconduct, but in context of a murder case, it could be construed as misconduct and should be treated as "other acts"); *Snyder v. State*, 210 Md. App. 370, 395 (2013) (though didn't contribute to guilty verdict, "reference to other guns found in the home might constitute other crimes evidence under the circumstances of this case (because possession of a firearm by a convicted felon is a crime)"); *Smith*, 218 Md. App. at 695, 710–11 (evidence suggesting defendant mishandled loaded weapon in past was "other acts" evidence in case charging involuntary manslaughter and use of handgun while committing a felony).

Not all inferences or impressions of potential misconduct by a defendant will be construed as "other acts" under Rule 5-404(b), though. In *Klauenberg*, for example, the appellant, who had been convicted of solicitation to commit murder, argued that a witness's testimony describing the appellant's behavior while police were searching his house was evidence of "other acts" that should not have been admitted at trial. 355 Md. at 550. Our Supreme Court disagreed: "[T]he fact that the police stood near appellant while he was acting peculiarly imparts a general impression that they feared appellant might act out. But there is no indication that he did." *Id.* Without evidence of misconduct (*i.e.*, "act[ing] out") the Court concluded that neither "[s]tanding in place without moving" nor "[s]tanding and watching while one's house is being searched" impugned the appellant's character. *Id.* at 550–51.

Here, Mr. Spicuzza argues that in the context of a child pornography case, a potential inference that Mr. Spicuzza had other "lewd" photos on his devices constitutes evidence of "other acts" that could create bias among the jury. In response, the State acknowledges that "jurors could reasonably infer that [Mr.] Spicuzza possessed other nude images." The State argues, however, that possession of adult pornography has become more socially acceptable and is neither a crime nor a bad act. We need not get into the palatability of adult pornography to answer this question, though.

At most, Nurse Dawkins's testimony could have created an inference that others among the thirty or so photos she reviewed might have been "lewd." But the State didn't say or imply that the remaining photos were pornographic; Nurse Dawkins didn't discuss

what the other photos depicted; and neither party brought up the other photos for the remainder of the trial. Without evidence that the photos *were* pornographic, all Nurse Dawkins's testimony revealed was that the detectives extracted other photos from Mr. Spicuzza's devices and showed them to a nurse. Having photos, without additional evidence of their nature, doesn't impugn a person's character. It is debatable whether having adult pornography on one's devices would impugn their character either, but we need not decide that point.

Nurse Dawkins's testimony was a drop in the bucket of evidence presented at this trial, and the only time the State discussed her testimony in front of the jury was to explain why she testified (*i.e.*, to show the steps the detectives took) and to reiterate the thoroughness of the investigation. We hold that Nurse Dawkins's brief testimony was relevant and was not evidence of "other acts."

JUDGMENT OF THE CIRCUIT COURT FOR SAINT MARY'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.