Circuit Court for Montgomery County
Case No. 137175C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0204

September Term, 2023

SOPHIA A. NEGROPONTE

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

Opinion by Eyler, James J.

Filed: January 23, 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).

Appellant, Sophia A. Negroponte, was charged with the murder of Yousuf Rasmussen. A jury sitting in the Circuit Court for Montgomery County found appellant not guilty of first-degree murder but guilty of second-degree murder with intent to inflict deadly or serious bodily harm and second-degree depraved heart murder. Based on the conviction, the court imposed two concurrent terms of incarceration of thirty-five years.

Appellant presents the following questions for our review which we have rephrased for clarity:

1. Did the trial court err in allowing the jury to hear portions of appellant's custodial interrogation in which two detectives questioned appellant's credibility?
2. Did the trial court err by allowing the State's rebuttal expert to offer an "expert" opinion that appellant had a motive to lie because she was a defendant in a murder trial?
3. Did the court err in finding that the defense had opened the door to discussion of appellant's prior violent conduct by reference to her prior inpatient rehabilitation, and if not, was the cross examination proportional?
4. Did the trial court abuse its discretion by refusing to instruct the jury on defense of habitation and, for purposes of the hot blooded response instruction, not clarifying that it was immaterial whether appellant was the initial aggressor?

We conclude that the trial court erred in allowing the jury to hear the contested portions of the video interrogation in which the police opined on appellant's credibility and by allowing the State's expert to opine on appellant's credibility. We decline to address question No. 3 and find no error with respect to question No. 4.

Factual Background

The charges stemmed from an altercation between appellant and her friend, Mr. Rasmussen. On February 13, 2020, appellant and Mr. Rassmussen were watching a movie

and drinking at appellant's apartment. Midway through the evening, a second friend, Philip Guthrie, arrived at appellant's apartment.

The trial of this case was lengthy and several witnesses testified. What occurred in appellant's apartment was the subject of testimony by the two eyewitnesses, appellant and Mr. Guthrie. We limit our summary of the evidence to their testimony and other evidence that is relevant to the issues presented on appeal.

All three persons in appellant's apartment drank during the course of the evening. At some point after Mr. Guthrie arrived, appellant and Mr. Rasmussen got into a verbal altercation followed by a physical altercation. Mr. Rassmussen eventually decided to leave, and he exited the apartment. He returned shortly thereafter because he had forgotten his phone at which point the verbal altercation began again. At some point the altercation moved to the kitchen. The altercation ended when Mr. Rasmussen was stabbed in the neck with a kitchen knife. Mr. Rasmussen died as a result of the stab wound.

Beyond those basic details, appellant and Mr. Guthrie disagreed as to what happened leading up to the stabbing. Mr. Guthrie testified that, when he arrived at appellant's apartment, appellant and Mr. Rasmussen had been drinking but did not appear overly intoxicated. He testified that he made two margaritas for himself and one for Mr. Rasmussen and that Mr. Rasmussen and appellant each had a vodka and Fresca. Over the course of the evening, no one became "overly intoxicated."

According to Mr. Guthrie, when appellant and Mr. Rasmussen began to argue, appellant grabbed Mr. Rasmussen and the two started wrestling. The arguments and fighting continued over the course of the evening with appellant always initiating the

physical altercations. As the evening progressed, the physical altercations became more intense, with appellant pinning Mr. Rasmusen and holding him down at one point. It was after this incident that Mr. Rasmussen left the apartment while appellant screamed at him.

According to Mr. Guthrie, when Mr. Rasmussen returned to collect his phone, the following occurred. Appellant continued to yell at him. Mr. Guthrie went into the kitchen to help Mr. Rasmussen look for the phone. Appellant and Mr. Rasmussen were on the threshold between the kitchen and the living room fighting. Appellant then ran into the kitchen and pulled out a chef's knife. She removed the protective plastic sheath from the knife and lunged towards Mr. Rasmussen, holding the knife to his neck. Mr. Rasmussen put his hands up. Mr. Guthrie was unsure as to whether Mr. Rasmussen was trying to block the knife or wrestle it away. Mr. Guthrie then saw appellant move and heard a spraying noise and liquid hitting the ground. When he next looked at Mr. Rasmussen, Mr. Rasmussen was covered in blood. Mr. Rasmussen stumbled and fell to the ground. Appellant approached Mr. Rasmussen and began pleading "don't die. don't die." Mr. Guthrie called 911.

Appellant testified that she was far more intoxicated that evening than Mr. Guthrie realized. She testified that she had had four large drinks of vodka directly from the bottle before any guests arrived. She introduced text messages in which she asked Mr. Rasmussen to bring more alcohol. She testified that, by the time Mr. Guthrie arrived, she and Mr. Rasmussen were both "plastered."

Appellant testified that the altercation began before Mr. Guthrie arrived when Mr. Rasmussen hit her in the face during an argument about her ex-boyfriend. She

acknowledged that over the course of the evening she and Mr. Rasmussen tackled each other. She also testified to several altercations that were not part of Mr. Guthrie's testimony, including one in which Mr. Ramussen tried to tackle appellant to show Mr. Guthrie that he could control her.

At times, appellant could not remember details. She testified that she could not remember Mr. Rasmusen leaving the apartment or returning. She remembered being hungry and going into the kitchen for pickles. She remembered Mr. Rasmussen coming up behind her and sneak-attacking her. At first, she thought it was playful but Mr. Rasmussen continued. She recalled that she attempted to end the fight but Mr. Rasmussen would not stop. She recalled "blurring out." The next thing she recalled is that Mr. Rasmussen swung a knife that she had placed on the table for cheese. She recalled that, after that, Mr. Rasmussen was on the floor, bleeding, while she tried to get him to breathe.

Neither appellant nor Mr. Guthrie was given a breathalyzer or a blood alcohol test. Mr. Rasmussen was tested at the time of his autopsy and had a blood alcohol content of 0.21.

At trial, appellant argued self-defense and imperfect self-defense. Relying primarily on her version of events and asserting inconsistencies in Mr. Guthrie's version of events, appellant argued that Mr. Rasmussen's death was the result of a chaotic series of fights instigated by Mr. Rasmussen and fueled by significant intoxication by all parties involved.

Additional facts will be presented in our discussion of the issues.

Custodial Interrogation

The State played for the jury excerpts from a video recording of appellant's post-arrest custodial interrogation by two detectives. The excerpts contained six statements by officers which appellant now contests:

> 1. *So it's kind of odd to me that you don't remember like what happened*—you remember everything else that happened tonight.
> 2. *It doesn't make sense*. And I know this is very traumatizing to you. Believe me. I can tell you love your best friend. Don't get me wrong. *But it doesn't make sense* for him to, you know, stab himself and then say. I don't want to die. *It doesn't make any sense*.
> 3. So maybe you just had the knife to be like hey, whatever. Shut up. You know? Fuck you . . . And then, he like you know, came at—came on to you like to push you or do some sort of wrestling move. And he got stabbed.
> 4. [I]n this case, I don't even know if you snapped. I really do think you guys were fucking around like you've done in the past and you went too far. . . . I do feel like you do care about him. *That's why it doesn't make any sense.*
> 5. *So I find it hard to believe that you don't remember*—and maybe, it wasn't intentional, *but that you don't remember having your knife in your hand to start with.*
> 6. I think you actually cared about him. Because you're really—you're upset. You've been asking how's he doing? I didn't know—but well I think you really cared about him. I'm just--I don't understand why you don't remember. And the problem with that is, the fact that you're saying you don't remember *makes it look like you're not being completely honest.*

(emphasis added).

Appellant argues that, although the interrogation was a valid investigative tactic, the commentary was unnecessary, improper, and unduly prejudicial when entered into evidence. Appellant explains that witnesses are not permitted to offer opinions on whether

other witnesses are telling the truth. Appellant argues that, by playing recordings of statements in which the detectives offered opinions on the veracity of appellant's statement that she could not remember certain details of the night, the State was commenting on the credibility of her version of events. Appellant notes that this Court has held that statements by law enforcement officers expressing disbelief in a suspect's version of events are inadmissible under Rule 5-401. Appellant argues that, in this case, the commentary was particularly prejudicial because appellant testified to the same lack of memory at trial.

The State claims that appellant's objections to some of the above-listed statements are not preserved. The State acknowledges that appellant objected at trial to statements 1, 5, and 6 but claims that there was no objection to statements 2, 3, and 4.

The State argues that, to the extent preserved, the detectives' statements were relevant and provided necessary context for the jury to understand appellant's statements. The State also argues that the evidence was not more prejudicial than it was probative. The State notes that the officers' skepticism was not hostile or confrontational and that they did not assert that appellant was lying. Rather, they expressed natural skepticism to odd assertions by appellant. The State argues that appellant added new details each time the detectives expressed skepticism. Thus, the State argues that the detectives' skepticism prompted specific probative statements and, therefore, put appellant's statements in meaningful context.

In reply, appellant argues that the objections were preserved by a combination of motions *in limine* and contemporaneous objections, at least as to all of the challenged statements except statement 3.

Appellant notes that police commentary need not be hostile or confrontational in order to be inadmissible. It must simply express opinions on the veracity of appellant's story, opinions which the jury should not be permitted to hear. As for the statement's value as context, appellant argues that, to understand appellant's consistent denials of memory and "evolving" version of events, one does not need to hear detectives' assertions of disbelief.

As a threshold matter, we must determine whether the issues appellant now raises were preserved. Both parties concede that objections to statements 1, 5, and 6 were preserved. Appellant objected to statement 4 in a motion *in limine*. At trial, appellant reraised all objections that were the subject of her motion. This contemporaneous objection was sufficient to preserve the objection for our review. *Klauenberg v. State*, 355 Md. 528, 539 (1999). Neither the motion nor appellant's contemporaneous objections referenced statement 2, however. We shall consider appellant's claim of error as regards statements 1, 4, 5, and 6. We conclude that the challenge to statements 2 and 3 were not preserved.

We review *de novo* a court's decision to admit evidence that appellant claims is irrelevant. *Calloway v. State*, 258 Md. App. 198, 216 (2023). It is well settled that an investigating officer's opinions on the truthfulness of a suspect's statement are not admissible under Rule 5-401. *Casey v. State*, 124 Md. App. 331, 338 (1999) (citing *Crawford v. State*, 285 Md. 431 (1979)). This is true when the statements baldly assert disbelief as well as when the statements make clear the officer's disbelief and, in essence, put it into evidence. *Snyder v. State*, 104 Md. App. 533, 554 (1995) (holding that an officer commenting on the "inconsistencies" in a suspect's statement was improper). Statements

in which the officer asserts repeatedly that he thinks something happened other than what the suspect claims had happened, fall into this latter category. *Walter v. State*, 239 Md. App. 168, 189 (2018) (holding that, among other statements, repeated assertions that the suspect had done something the suspect denied were inadmissible).

Notably, this Court has made clear that our holdings on the admissibility of officer statements of disbelief are not based on any police misconduct. *Walter*, 239 Md. App. at 193. Therefore, the question is not whether the police were confrontational or aggressive in a way that might have affected appellant. *Id.* Rather, the issue is what effect hearing the assertions of belief by police officers may have on the jury. Thus, the fact that the interview was not hostile is irrelevant to our determination today.

The State urges us to remember that, in some cases, statements by the police can become probative to give context to a suspect's changing story. *Id.* at 190, 193. But the circumstances in which such commentary is probative are narrow. We have held that "[i]n general, where the investigators' comments do not induce the suspect to alter his account or to inculpate himself," a court should exclude the portions of an interview where the officer "directly or indirectly express[es] their disbelief in the suspect's statements." *Id.* at 193. We have rejected arguments that an officer's disbelief of a suspect's statement is necessary context for the suspect's repeated assertion, even of an implausible story. *Id.* at 190. Even where there is some probative value to the police commentary that probative value must be weighed against the considerable danger of unfair prejudice that such statements inherently bring. *Id.*

Here the statements at issue indicate that the police disbelieved appellant. The statements expressed the view that appellant's version was "odd," that it didn't "make sense," that they "don't understand" why she was stating that she did not remember. The detectives commented that they found appellant's version of events "hard to believe" and that it looked like appellant was not being honest. Under our long-established precedent, these kinds of assertions are not relevant and bear a high risk of prejudice. *Casey*, 124 Md. App. at 338.

We acknowledge the State's argument that the expression of disbelief provided necessary context for the alleged evolution in appellant's version of events. The State argues that in appellant's first rendition of the story, appellant had said "And then for some reason, the knife went—I blame myself. But Philip was there. And then I was trying to—like me and Yousuf usually tackle each other and stuff. And then, the knife was in his neck, and I started like—and he pulled it out."

In a later rendition, she added the detail that she and Mr. Rasmussen often tackled each other. Later, she told the detectives explicitly that she didn't remember the knife going in; she only remembered pulling it out. Then she clarified that she remembered Mr. Rasmussen swinging the knife but stated that they were just playing games. When officers pressed her again, she said that Mr. Rasmussen had started out with the knife, but that she had ended up with it. When asked why Mr. Rasmussen had picked up the knife she said "Honestly, I think that I was trying to shut him up, and I just did something horribly wrong." Still later, there follows a series of conversations in which appellant speculates about how the knife could have ended up in Mr. Rasmussen's neck and why she did not

remember, including speculation that Mr. Rasmussen may have committed suicide and that she might not remember because she drank so much. Appellant repeatedly asserted that she did not remember what happened.

The fact that appellant repeated an allegedly implausible story—that she did not remember the moment of the stabbing—and that she changed her recollection of detail was relevant. The expressions of disbelief by the detectives, however, were not. *Walter*, 239 Md. App. at 190. We quote the discussion in *Walter,* in an opinion authored by Judge Arthur, because it is applicable to this case as it was in that case.

> More recently, in *Casey v. State*, 124 Md. App. 331, 339, 722 A.2d 385 (1999), this Court reversed a criminal conviction in part because the jury had heard a recording of an interrogation in which the investigators expressed disbelief in the defendant's account by telling him, "we know that's not true," and "we know different." *Id.* at 337-38, 722 A.2d 385. In his opinion for this Court, Chief Judge Joseph F. Murphy, Jr., cited *Crawford* for the proposition that it is "well settled that the investigating officers' opinions on the truthfulness of an accused's statements are inadmissible under Maryland Rule 5-401," which defines "relevant evidence." *Id.* at 339, 722 A.2d 385.
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> [E]ven if we assumed that the detective's comments might have some relevance in providing context for Walter's responses, the fact is that few, if any, of Walter's responses were more than minimally probative in the State's case. The questions did not impel Walter to inculpate himself or to alter his account. To the contrary, Walter's account remained largely the same throughout the interview. Consequently, the detective's expressions of disbelief had little effect other than to project an aura of official skepticism over Walter's declaration of his innocence. . . . To make matters worse, the detective's questions and comments were often unnecessary to provide any context for Walter's answers, which is the only ostensible reason for allowing the jury to hear what the detective said. To

> understand that Walter repeatedly and consistently denied that he had touched M. in an inappropriate way or that he had had sexual intercourse with her, the jury did not need to hear the detective's accusations and expressions of disbelief. . . . As Walter argues, many of the detective's statements in the interview supplied 'commentary not context.'

Id. at 188-92 (footnotes omitted).

To understand that appellant consistently and repeatedly denied memory of the key moment in the attack in this case, and changed her recollection of detail, the jury did not need to hear the detectives' opinions on her claims or their disbelief. *Id.* This was "commentary not context."

Nor is it the case that any inconsistency in a suspect's story automatically opens the door to the jury hearing evidence of police disbelief. Here, in several instances, appellant was nonresponsive to police assertions of disbelief, responding instead to other comments made by the police, reiterating previous assertions, or simply stating that she did not remember what happened. Many of the "changes" alleged by the State occurred unprompted by police disbelief. As a result, the police's disbelief was not necessary to explain the context of appellant's statements. These statements were irrelevant and inadmissible. *Walter*, 239 Md. App. at 190.

We hold the circuit court erred in admitting the challenged statements.

Expert Testimony on Credibility

Appellant and the State each presented experts on appellant's potential level of intoxication. Appellant offered the opinions of an expert, Dr. Michael O'Connell, a forensic psychologist. Based on his review of school and medical records relating to

appellant, interviews of appellant, and other evidence in the case, Dr. O'Connell opined that, because of cognitive defects and intoxication, appellant's understanding of *Miranda* rights when she waived them was consistent with someone who did not have a meaningful understanding of those rights.

Appellant also called Dr. John Steinberg, an expert in addiction medicine, and Richard McGarry, a forensic toxicologist, to testify as expert witnesses. Relying on appellant's statements, photographs, and other evidence Dr. Steinberg opined that appellant had a blood alcohol level of 0.33 at the time of Mr. Rasmussen's death and 0.28 at the time of her post-arrest interrogation. Relying on similar evidence, Mr. McGarry opined that, at the time of the altercations, appellant had a blood alcohol level between 0.28 and 0.32.

One of the State's experts, Dr. Christiane Tellefson, a forensic psychiatrist, testified that "there was not any reliable information about exactly how much [appellant had to drink]" and that she was not going to wholly rely upon appellant's version of events "because her account of how much she drank is most likely unreliable." The State asked Dr. Tellefson to elaborate on why she believed appellant's version of events was unreliable. Over objection from defense counsel, she testified as follows:

> "[Appellant's] account of how much she had to drink *is unreliable* for two reasons. One is that she is suffering from alcohol use disorder, or what we laymen would call alcoholism, and people with that disorder tend to both underestimate and overestimate what they had been drinking. *And the second reason is that she is a defendant in a murder trial, and so just like Dr. O'Connell was talking about yesterday, you have to take what she says with a grain of salt because she has an incentive to embellish or diminish the*

> *amount of the alcohol she used because she's in that situation."*

(emphasis added).

Defense counsel made a motion to strike and for a mistrial based on Dr. Tellefson's comment that the appellant was less credible as a defendant in a murder trial. The court ruled: "I think it's proper for a jury to consider an expert saying that that is a factor to consider when we're considering credibility. I don't think that-and they don't have to believe that. They may think that's not a factor."

Appellant argues that, just as the State cannot introduce testimony about the appellant's credibility from the investigating officer, so too is the State prohibited from offering expert testimony on appellant's credibility, including expert testimoney expressing doubt about credibility. Thus, Dr. Tellefson's claim that appellant's statements should be taken with a grain of salt and that appellant had an incentive to embellish her story was inadmissible. It was particularly prejudicial because the issue of credibility of appellant and Mr. Guthrie was at the core of this case.

Because appellant's experts relied, in part, on appellant's testimony, the State argues that Dr. Tellefson's testimony was an appropriate rebuttal to Dr. O'Connell's testimony. Dr. Tellefson relied, *inter alia*, on bodycam footage of appellant from the night of the incident and appellant's recorded statement. The State maintains that the testimony of appellant's experts opened the door to opinions about how "unquestioning reliance on appellant's statements would undermine the integrity of any resulting analysis" and, therefore, to an opinion that Dr. O'Connell should not have relied on appellant's version

of events because it was not credible. In support of this argument, the State notes that Dr. Tellefson limited her opinion to appellant's credibility as regards her drinking because that was the evidence that undergirded Dr. O'Connell's conclusions. The State further argues that appellant opened the door when Dr. O'Connell testified that he considered the possibility that appellant was feigning or malingering.

Appellant responds that attacks on Dr. O'Connell's methodology might plausibly include questions about how appellant's reliability might affect Dr. O'Connell's conclusions but do not license the State to have witnesses broadly opine on appellant's general reliability or credibility. Furthermore, appellant notes that Dr. O'Connell's testimony about malingering simply focused on whether there was reason to be concerned that appellant had deliberately failed one of his cognitive tests. Dr. O'Connell made no general conclusion about appellant's credibility for the State to rebut.

A witness may not express an opinion on another witness's credibility. *Fallin v. State*, 460 Md. 130, 160 (2018); *Hutton v. State*, 339 Md. 480, 503 (1995); *Bohnert v. State*, 312 Md. 266, 276 (1988). This rule ordinarily includes expert's opinions. *Fallin*, 460 Md. at 159-160.

There can be no question that Dr. Tellefson's comment "She is a defendant in a murder trial, and so . . . you have to take what she says with a grain of salt because she has an incentive to embellish or diminish the amount of the alcohol she used because she's in that situation" was an assessment of appellant's credibility. It may have been cabined to credibility on the subject of alcohol. But, given the centrality of alcohol in appellant's case,

the comment was nonetheless a comment on appellant's credibility about a material fact. It was, therefore, *prima facie*, inadmissible. *Id.*

The State urges us to consider, however, whether appellant opened the door to such commentary with the testimony of Dr. O'Connell about malingering. The "opening the door" doctrine, "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." *Daniel v. State*, 132 Md. App. 576, 591 (2000). It is an expanded relevance rule that envisions admitting otherwise competent evidence that is relevant only because of evidence offered by the opposing party. *Id.* The "opening the door" doctrine does not permit the admission of incompetent evidence, inadmissible for reasons other than relevancy. *Id.* Here, the Maryland Supreme Court has held that experts may not comment on credibility, not because such commentary is irrelevant, but because it improperly invades the province of the jury. *Bohnert*, 312 Md. at 278.

Opening the Door to Prior Conduct

At trial, appellant's theory of defense was that she had experienced significant trauma during her life and that trauma, along with intoxication, led her to believe that she was in danger at the time Mr. Rasmussen was stabbed. Before trial, appellant identified Dr. Neil Blumberg, as an expert witness in forensic psychology. Purportedly, Dr. Blumberg was going to testify that an individual with appellant's psychological profile, including several psychological conditions and a series of negative life experiences, might honestly

believe their life and safety were in danger when confronted with aggressive behavior from Mr. Rasmussen.

In order to provide a basis for that witness's testimony, appellant and her mother testified that appellant testified to various incidents, including abandonment as a baby and adoption, domestic abuse, sexual assault, and alcohol abuse. Appellant's mother testified that, in December 2017, appellant was in a bad motor vehicle accident, and as a result, received inpatient alcohol abuse treatment at a treatment center in Mississippi. Thereafter, appellant received outpatient treatment in the District of Columbia. In 2018, appellant returned to the treatment center in Mississippi for inpatient treatment. Appellant's mother testified that, in October 2019, appellant was charged with driving while impaired. Subsequently, because of the charge, appellant received treatment at a facility in Rockville.

On cross-examination of appellant's mother, the prosecutor asked what precipitated the second treatment in Mississippi. Defense counsel objected and, at a bench conference, stated that the expected answer would be that appellant, while intoxicated, had assaulted a friend. Prior to the trial, the State had stipulated that it would exclude reference to that assault. However, the prosecutor argued that appellant had introduced evidence of her prior traumas and reasons for treatment except for the second visit to Mississippi. The court overruled the defense objection. The State once again used evidence of appellant's prior assault on its cross-examination of appellant. The State also questioned appellant's experts about whether appellant had made them aware of this incident in order to establish that they had no prior knowledge.

Similarly, on multiple occasions, the State introduced a portion of appellant's journal from her therapy program in which she wrote about how she does bad things when she drinks. Appellant once again objected and the State noted that appellant had failed to disclose this journal to her experts. The court overruled.

Appellant argues that the evidence of that prior drunken assault was inadmissible "bad acts" evidence under Md. Rule 5-404(b). Appellant acknowledges that a prior bad act may be admissible if it is relevant for some purpose other than propensity and the probative value is not outweighed by the prejudicial effect, but contends that there was no special relevance to this testimony beyond propensity. To the extent that the testimony of appellant's mother that appellant had been in inpatient treatment made discussion of why that treatment was necessary, the evidence of appellant's prior assault was disproportionately prejudicial. Appellant argues that this "bad acts" evidence was compounded by the alleged propensity evidence in the journal.

The State contends that appellant could not lay out a tale of her "traumatic life" and paint a sympathetic picture of her struggles with alcohol abuse without painting a full picture of her relationship with alcohol. Similarly, the State contends that to present reasons for each of appellant's stints in treatment except one suggests that appellant simply had a moment of insight and realized that she needed help, an impression that was not true. Furthermore, the State notes, that appellant did not discuss either her journal or her prior assault with her experts and, that lack of knowledge undermined their conclusions.

This issue is fact-dependent and whether and to what extent evidence of appellant's prior conduct is admissible will depend on how the case is retried, assuming a retrial. On

any retrial, it is unlikely that precisely the same situation will exist. Thus, we will not address this issue.

Jury Instructions

Finally, appellant contends that two additional jury instructions should have been given. Appellant observes that Mr. Rasmussen was killed after leaving appellant's apartment and then returning. Thus, defense counsel requested that the jury be instructed with respect to the defense of habitation using MPJI-Cr. 4:17.2. This jury instruction would have instructed, in pertinent part, as follows:

> You have heard evidence that the defendant killed Mr. Rasmusen in defense of her home. You must decide whether this is a complete defense, a partial defense, or no defense in this case. . . . If you find that the defendant actually believed that Mr. Rasmussen posed an imminent threat of death or serious bodily harm, and that such belief was reasonable, you must find the defendant not guilty. If you find that the defendant had the intent to kill and actually believed that Mr. Rasmussen posed an imminent threat of death or serious bodily harm, but that such belief was unreasonable, you should find the defendant not guilty of murder, but guilty of manslaughter. If you find that the State has persuaded you, beyond a reasonable doubt, that the defendant did not have an actual belief that Mr. Rasmussen posed an imminent threat of death or serious bodily harm, you should find the defendant guilty of murder.

Instead, the court provided an instruction which read, in pertinent part:

> Complete self-defense, sometimes called perfect self-defense, is a total defense, and you are required to find the defendant not guilty, if all of the following four factors are present:
>
> > (1) the defendant was not the aggressor or, although the defendant was the initial aggressor, she did not raise the fight to the deadly force level;

> (2) the defendant actually believed that she was in immediate or imminent danger of death or serious bodily harm;
> (3) the defendant's belief was reasonable; and
> (4) the defendant used no more force than was reasonably necessary to defend herself in light of the threatened or actual force.
>
> You must find the defendant not guilty unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent.
>
> Even if you find that the defendant did not act in complete self-defense, she may still have acted in partial self-defense. For partial self-defense to apply, you still must find that the defendant actually believed she was in immediate or imminent danger of death or serious bodily harm and the defendant was not the aggressor or, although the defendant was the initial aggressor, she did not raise the fight to the deadly force level.

Appellant argues that the key difference between the defense of habitation instruction and the instruction given is that defense of habitation does not require appellant to retreat. Appellant argues that the instruction that the jury must find that "the defendant was not the aggressor or, although the defendant was the initial aggressor, she did not raise the fight to the deadly force level" without an instruction that the defendant did not have the duty to retreat might lead the jury to believe that appellant had to retreat instead of defending herself while Mr. Rasmussen was in her home.

The State notes that the primary difference between the defense of habitation instruction and the self-defense instruction is generally that the self-defense instruction includes a duty to retreat. *Law v. State*, 21 Md. App. 13, 26 (1974). The State notes that the trial court eliminated any mention of the duty to retreat from the jury instructions in this

case, and argues that, therefore, there was no additional instruction needed for defense of habitation.

We review the trial court's decision to give particular jury instructions for abuse of discretion. *Rainey v. State*, 480 Md. 230, 255 (2022). A circuit court must give a requested jury instruction when "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given." *Id.* The primary point of contention here is whether the defense of habitation instruction is necessary under prong (3) or whether they had already been covered by other instructions.

Appellant's only argument that the defense of habitation instruction was not adequately covered by the self-defense instruction is that the jury might not have been adequately instructed on the fact that appellant had no duty to retreat. This Court has already held, however, that a court need not instruct the jury on the lack of duty to retreat in cases where the concept of a duty to retreat had not been introduced to the jury in the first place. *Sangster v. State*, 70 Md. App. 456, 481 (1987) ("The requested instruction was, however, correctly refused because the castle doctrine is an exception to the retreat rule and no instruction was given on the retreat rule." (citation omitted)). This is true even where the trial court included in its self-defense instruction the requirement that the defendant was not the first aggressor. We find no error, therefore, in the trial court's decision not to give additional instruction on defense of habitation.

Appellant also contends that the trial court erred in its refusal to modify the pattern hot-blooded response jury instruction. The trial court gave the pattern jury instruction MPJI-Cr. 4:17.4C which reads, in pertinent part:

> Killing in hot blooded response to legally adequate provocation is a mitigating circumstance. In order for this mitigating circumstance to exist in this case, the following five factors must be present: . . . (2) the rage was caused by something the law recognizes as legally adequate provocation, that is, something that would cause a reasonable person to become enraged enough to kill or inflict serious bodily harm. The only act that you can find to be adequate provocation under the evidence in this case is a battery and or a fight between the victim and the defendant

Appellant requested that the court add in the following language: "in a mutual fight between two people, it is irrelevant who struck the first blow" drawn from *Whitehead v. State*, 9 Md. App. 7, 14 (1970), and the court refused.

The State contends that there is a preference for following the pattern jury instructions and that, absent a situation in which the pattern jury instructions misstate the law or fail to state a necessary part of the law, we should not find error in the trial court's adherence to the pattern jury instructions. The State argues that there is nothing in the language of the pattern instruction that would suggest that a fight must be started by the victim to constitute legally adequate provocation and, therefore, no additional clarificatory instruction was necessary.

Once again, our review of appellant's requested instruction turns on whether the content of the requested instruction was fairly covered elsewhere in the jury instructions. Just as there would be no purpose to instructing on the lack of a duty to retreat in a case

where the prior jury instructions had not suggested that a duty to retreat, *Sangster*, 70 Md. App. at 481, there would be no purpose in instructing the jury that it did not matter who threw the first blow where the prior jury instructions had not suggested that it did matter. Here, the prior jury instructions simply stated that a "fight between the victim and the defendant" constituted legally adequate provocation. The natural implication of the words "fight between the victim and the defendant" is that they refer to a fight involving both the victim and the defendant regardless of who started it. We find no error, therefore, in the trial court's decision not to give an additional instruction on this point.

Harmless Error

Because we have concluded that the circuit court erred, we must reverse the conviction unless the error was harmless beyond a reasonable doubt. *Dionas v. State*, 436 Md. 97, 108 (2013). We must be convinced that there is no reasonable possibility that the evidence complained of may have contributed to the guilty verdict. *Dove v. State*, 415 Md 727, 743 (2010). Where credibility is at issue, an error affecting the jury's ability to assess credibility is not harmless error. *Walter*, 239 Md. App. at 192.

Here, the case turned primarily upon whether the jury believed appellant over Mr. Guthrie. On Mr. Guthrie's version of events, appellant did not engage in self-defense. On appellant's version, she might have. Therefore, testimony affecting the jury's ability to evaluate appellant's credibility was paramount. Officer statements and expert testimony that appellant's story does not make sense, is hard to believe, is not completely honest, or needs to be taken with a grain of salt because of her status as the defendant all affect the

jury's ability to assess her credibility. For that reason, we cannot say beyond a reasonable doubt that the errors were harmless.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY MONTGOMERY COUNTY.