Circuit Court for Washington County
Case No. C-21-CR-23-000417

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0072

September Term, 2024

THOMAS MORTON

v.

STATE OF MARYLAND

Wells, C.J.,
Kehoe, S.,
Eyler, Deborah S.
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: July 16, 2025

Appellant, Thomas Morton, convicted by a jury of sexual offense in the fourth-degree and assault in the second degree for his contact with a correctional officer while incarcerated, appeals from the proceedings in the Circuit Court for Washington County on two grounds: first, that the evidence was insufficient to prove that the proscribed touching of the victim was intentional, and second, that the circuit court erred in admitting, under the opening the door doctrine evidence, that the Department of Public Safety and Correctional Services ("DPSCS") found Mr. Morton guilty of rules violations stemming from the same incident giving rise to his criminal charges. We affirm the ruling of the circuit court.

BACKGROUND

The incident occurred on October 13, 2021, while Mr. Morton was confined at the Maryland Correctional Training Center ("MCTC"), when I.W., a correctional officer then employed at MCTC, was frisking Mr. Morton before his recreational walk. I.W. testified that the process for moving an inmate for a recreational walk was to cuff the inmate's hands behind his back while still in his cell through the "feed up slot," after which the door to the cell would open, and the correctional officer would "frisk pat search them for weapons or contraband" before escorting them outside to the walk cages. During the encounter, I.W. made initial contact with Mr. Morton, who was handcuffed, and then, having at least one hand on Mr. Morton, as required, "began [her] pat down search of the left side of his body." She testified, "as I was going down the right side of his body he dipped down and grabbed my genital area." I.W. could not tell which arm Mr. Morton used because she and Mr.

Morton were so close together. She said that he did not say anything to her after the incident. She stated she had not given Mr. Morton permission to touch her, and inmates were not permitted to touch correctional officers during such encounters. I.W.'s response was to step away from Mr. Morton, put him in his cell, and, consistent with the policy of the Division of Corrections, cancel his recreational walk before immediately reporting the incident to her immediate sergeant in her control bubble.

On cross-examination, when asked to specify what she meant when she said, "genital area," I.W. responded, "my vaginal area." She conceded that Mr. Morton had his back to her, and could not see her, but stated that he knew she was behind him. After eliciting from I.W. her height of five feet five inches and Mr. Morton's height of six feet one inch, Mr. Morton's counsel challenged I.W. as to whether Mr. Morton could reach down to the area I.W. described. I.W. stated that if Mr. Morton bent down, he could reach her genital area.

Mr. Morton's counsel then asked I.W. whether Mr. Morton was charged internally with and found not guilty of "engaging in a disruptive act." I.W. responded that he "was placed on disciplinary seg[regation] that night and then he was shipped up to North Branch in Cumberland." When I.W. stated that she did not know the exact nature of Mr. Morton's internal charges, counsel presented I.W. with a copy of the disciplinary results to refresh her recollection. After eliciting from I.W. that Mr. Morton was found not guilty of the disruptive act, committing an act of masturbation, or conspiracy to commit an act of

masturbation, Mr. Morton's counsel sought the document's admission, which the court denied.

On redirect examination, after refreshing her memory using the internal violation report, the State asked I.W. for the full list of charges from the administrative hearing inside the correctional facility. She listed, in addition to the disruptive act and the masturbation charges, assault on staff and performance of sexual conduct or contact and stated that Mr. Morton was found administratively guilty of the latter charges. His counsel objected on grounds that exposing the jury to the administrative findings of guilt could lead the jury to find Mr. Morton guilty in the instant proceeding. The State responded that the opening the door doctrine permitted questioning as to the entire picture regarding the hearing and the contents of the document presented to I.W. The court, after commenting on the State's apparent trial strategy of failing to object to clearly objectionable hearsay to facilitate the later admission of curative evidence, permitted the State's questions on the remaining charges to prevent the jury from being misled by the acquittals of the two rule violations the defense had raised and explained, "[t]hey played with fire and now the rest of the fire is going to burn their client." However, it excluded the document itself on hearsay grounds. Mr. Morton further contested the testimony on the grounds that its admission was unduly prejudicial, and the court responded, "you can't have just what benefits your client and then say the other half is prejudicial. The door is opened. . . . It confounds the Court that you opened it. But you opened it and now it's open and this has to come in."

The State, through Detective Robert Fagan, who investigated the incident, secured the admission of a recording of the encounter captured by the MCTC's video surveillance. Detective Fagan described the video's contents:

> It [showed] Officer [I.W.] approaching Inmate Morton from the back. Inmate Morton was cuffed, and Officer [I.W.] began to perform a pat down, just checking for weapons or contraband. At that time, it did appear that Mr. Morton dipped down during the pat down.

Detective Fagan confirmed that the video was consistent with what I.W. had reported to him. The video was then played for the jury. On cross-examination, in response to defense counsel's interrogative assertion that "the video does not show Mr. Morton grabbing [Correctional Officer] [I.W]'s genital crotch area," Detective Fagan responded, "The video shows Mr. Morton dipping." The video, which captures the front of Mr. Morton and I.W. standing behind him, does not illuminate the precise nature of the contact between I.W. and Mr. Morton.

After the court excused Detective Fagan, the State recalled I.W. and asked her about the contact. She stated Mr. Morton "grabbed" her "with an open hand" and that it was not a light brush or touch. The contact made I.W. "very uncomfortable," and she said that she had been much more cautious since the incident because she was worried about something like it happening again. I.W. was excused, and the State rested.

Mr. Morton then moved for judgment of acquittal on the charge of sexual offense in the fourth degree on grounds that the State had not produced evidence to show that Mr. Morton touched I.W. with the specific intent to gain sexual gratification or to abuse her. The State responded that a reasonable fact finder could infer from I.W.'s testimony, the

video, and the fact that Mr. Morton is an inmate in a facility with few women that his contact with I.W. could have been for the purpose of gratification. Mr. Morton argued that since he could not see what he was touching, there could be no inference to his intent, and that a more plausible explanation was that "he dipped his shoulder to adjust his handcuffs out of comfort," and incidentally made contact. The court noted that intent must often be proven by surrounding circumstances, reasoned that any inferences as to intent, e.g., that a person ordinarily intends the natural and probable consequences of his acts, were ones the jury was permitted to make, and denied the motion. Mr. Morton then moved for judgment of acquittal regarding the second-degree assault charge on grounds that there had not been enough evidence to show that there was actual physical contact between he and I.W. The court rested its denial of this motion on I.W.'s testimony to the contact and its non-consensual nature. The jury convicted Mr. Morton on both charged offenses and this appeal followed.

QUESTIONS PRESENTED

Mr. Morton, presents two questions on appeal:

1. Was the evidence sufficient to prove beyond a reasonable doubt that any touching by Mr. Morton was intentional rather than accidental?

2. Did the circuit court err in admitting under the opening the door doctrine evidence that a Department of Public Safety and Correctional Services hearing officer found Mr. Morton guilty of rules violations stemming from the same incident giving rise to his criminal charges?

The first question, we answer, "Yes," and the second, "No." We affirm the rulings of the trial court.

DISCUSSION

Sufficiency of the Evidence for Fourth-Degree Sexual Offense

Mr. Morton was convicted of a fourth-degree sexual offense under § 3-308(b)(1) of the Criminal Law Article, which prohibits "sexual contact with another person without the consent of the other," with sexual contact being defined at § 3-301(e)(1) of that article as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." *See Bible v. State*, 411 Md. 138, 157 (2009) (fourth-degree sexual offense is specific intent offense). A fourth-degree sexual offense conviction must stand on sufficient proof of two elements: "(1) the fact of the touching, and (2) the intent to do so for sexual arousal or gratification." *Id.*

Mr. Morton challenges the sufficiency of the evidence regarding the latter element and argues that the State's evidence does not meet the burden required to prove that he touched I.W. with the purpose of sexual arousal or gratification; rather, the nature of the contact and the circumstances give rise to only a mere suspicion he acted with the proscribed intent, which is not sufficient to support a criminal conviction.

"The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Pinkney v. State*, 151 Md. App. 311, 326 (2003) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)); *see also Jackson v. Virginia*, 443 U.S. 307, 313 (1979). Rather than "whether the trial court's verdict is in accord with what appears to be the weight of the evidence," our

concern is "only with whether the verdicts were supported by the evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of the facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

"A conviction can rest on circumstantial evidence alone," but such a conviction "cannot be sustained on proof amounting only to strong suspicion or mere probability." *Taylor v. State*, 346 Md. 452, 458 (2007). "[S]ince intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence." *Pinkney*, 151 Md. App. at 328 (quoting *State v. Raines*, 326 Md. 582, 591 (1992)). Circumstantial evidence which "merely arouses suspicion or leaves room for conjecture is obviously insufficient[;]" it must "afford the basis for an inference of guilt beyond a reasonable doubt." *Taylor*, 346 Md. at 458 (quoting 1 Underhill, Criminal Evidence § 17, at 29 (6th ed. 1973)); *see also Ford v. State*, 330 Md. 682, 704 (1993) (quoting *Davis v. State*, 204 Md. 44, 51 (1954)) ("It is permissible to infer that 'one intends the natural and probable consequences of his act.'"). "To prove guilt beyond reasonable doubt it is not necessary that every conceivable miraculous coincidence consistent with innocence be negatived." *Hayette v. State*, 199 Md. 140, 144 (1952) (citation omitted). And "on questions of scienter,

reasons for disbelieving evidence denying scienter may also justify finding scienter." *Kolker v. State*, 230 Md. 157, 159 (1962) (quoting *Hayette*, 199 Md. at 145). We noted in *Travis v. State*, "Appellate concern is not with what **should** be believed, but only with what **could** be believed." 218 Md. App. 410, 423 (2014).

A factfinder may infer that alleged sexual contact was made with the purpose of sexual arousal or gratification from the circumstances surrounding the touching or from the character of the touching itself. *Bible*, 411 Md. at 158. The Court elaborated:

> Circumstances surrounding the touching that would aid in the determination of whether it was for purposes of sexual gratification might include whether the defendant and victim were strangers or knew each other; whether either party was undressed; whether anything was spoken between them; whether the touching occurred in public or in a secluded area; whether the defendant displayed any signs of sexual arousal; or whether the defendant behaved in a nervous or guilty manner when another person came upon the scene. With respect to the touching itself, the force of the touching, the motion (was it a pat, a rub back and forth, a circular motion, a brush), the duration, and the frequency are all important. This list is not exhaustive, but merely descriptive of the type of circumstantial evidence that would be relevant.

Id. at 158–59. In other words:

> What is involved in sexual contact is purposeful tactile contact and tactile sensation, not incidental touching. It is the sexually oriented act of groping, caressing, feeling or touching of the genital area or the anus or the breasts of the female victim.

Travis, 218 Md. App. at 465.

I.W. stated, on the stand, that Mr. Morton "dipped down" and "grabbed" her "genital" or "vaginal" area. In testifying so, she described "groping," the archetypical or quintessential contact which typically leaves no room in the mind of an observer, or of the trier of fact, as to the intent underlying the act. The strength of the conclusions which may

be drawn from her testimony alone is buttressed by the availability of the inference that Mr. Morton, who was in an all-male prison, might take sexual gratification from, upon encountering a woman, an attempt to make sexual contact with her. Such an inference is not based on speculation or conjecture but drawn from "common sense, powers of logic, and accumulated experience in life." *State v. Suddith*, 379 Md. 425, 446 (2004) (quoting *Robinson v. State*, 315 Md. 309, 318 (1989)).

Mr. Morton argues it is more reasonable to infer that the purpose of his dipping down was to adjust his handcuffs and that the contact was incidental, which is supported by the arguably benign video surveillance footage of a camera which was in a position to record only the "dip" and not the "grab." We acknowledge that many indicia of illicit purpose identified in *Bible* were not present in the encounter: the parties were both dressed, nothing appears to have been spoken between them, the touching occurred in a public, or at least un-secluded area, and Mr. Morton does not appear to have displayed any signs of sexual arousal or behaved in a nervous or guilty manner. But the "trier of fact may believe, or disbelieve, accredit or disregard, any evidence introduced." *Lapin v. State*, 188 Md. App. 57, 77 (2009) (quoting *Walker v. Gro*w, 170 Md. App. 255, 275 (2006)). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question 'is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence.'" *Suddith*, 379 Md. at 447 (quoting *Smith*, 374 Md. at 557) (alterations in original). The jury's inference that Mr. Morton's touching of the victim was for the purpose

of sexual gratification was supported by the nature of the touching and the circumstances surrounding the touching. There was sufficient evidence to support the conviction, and we affirm the trial court's denial of Mr. Morton's motion for judgment of acquittal.

Challenges to the Second-Degree Assault Charge

The jury also convicted Mr. Morton with second-degree assault for his contact with I.W. Mr. Morton's challenge to this conviction proceeds that the State failed to prove the contact was intentional because it "follows necessarily that [Mr. Morton] did not have the general intent required for second degree assault" from the fact that he could not see I.W when he made contact. Mr. Morton also raised the same arguments which he put forth for the sexual offense in the fourth degree charge. Mr. Morton also argues that, in the event his challenge is unpreserved, his counsel rendered ineffective assistance by failing to move for judgment of acquittal on these grounds. Mr. Morton's argument for judgment of acquittal consisted of the assertion that "I don't think there's been enough evidence produced to show that there was actual physical battery." We note that the State does not contest whether the challenge to the assault conviction on the basis of intent was preserved and argues the merits. In this case, we understand Mr. Morton's motion, based on its broad verbiage, to comprise of a challenge on the basis of each of the elements and shall address

the merits of whether the State produced evidence sufficient to prove assault in the second degree.

Second-degree assault[1] is a crime with three types: "(1) intent to frighten, (2) attempted battery, and (3) battery." *Jones v. State*, 440 Md. 450, 455 (2014) (citation omitted). The relevant variety, battery, is "a touching that is either harmful, unlawful or offensive," *Quansah v. State*, 207 Md. App. 636, 647 (2012) (citing *Marlin v. State*, 192 Md. App. 134, 166, *cert. denied*, 415 Md. 339 (2010)), which may be either an intentional or an unintentional crime. *Lewis*, 263 Md. App. at 647. Intentional battery is a specific intent crime: the defendant must have caused physical contact with the specific intention of harming or offending the victim, even if the intended injury is slight. *Id.* at 648 (citing *Lamb v. State*, 93 Md. App. 422, 455 (1992)). Unintentional battery is a general intent offense: "the intent need only be for the touching itself; there is no requirement of intent to

[1] In *Lewis v. State*, we provided guidance on the application of precedential case law in light of the codification of what had long been common law:

> Assault and battery were common law crimes in Maryland until 1996, when multipurpose assault and battery statutes covering the entire subject matter were enacted, abrogating the common law. *Robinson v. State*, 353 Md. 683, 694 (1999). Nevertheless, the meanings of the statutory crimes "are judicially determined," so we take guidance from case law analyzing the common law meanings. *See* Md. Code (2002, 2021 Repl. Vol.), § 3-201(b) of the Criminal Law Article ("CR") (defining "assault" to encompass "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings").

263 Md. App. 631, 647 (2024).

cause a specific injury." *Elias v. State*, 339 Md. 169, 183 (1995) (quoting *State v. Duckett*, 306 Md. 503, 510 (1986)). We have said:

> the types of offenses which fall within the ambit of the crime of battery vary widely. A person may commit battery by kissing another without consent, touching or tapping another, jostling out of the way, throwing water upon another, rudely seizing a person's clothes, cutting off a person's hair, throwing food at another, or participating in an unlawful fight. On the other hand, a battery may take the form of a serve beating.

Lamb, 93 Md. App. at 447–48 (quoting *Duckett*, 206 Md. at 510–11).

On the evidence adduced at the instant trial, the jury was permitted to convict Mr. Morton at least of battery in the intentional modality. The jury heard testimony that Mr. Morton, with I.W. standing close enough behind Mr. Morton to frisk him, "dipped down" some six or eight inches and did not brush or touch but "grabbed" the "vaginal area" of the victim, and it saw footage confirming the "dip." The jury is permitted to believe the testimony of I.W. that the grab occurred. It may infer that the grab was intentional, and since it is natural and probable that a victim would take offense to such an act, the jury is permitted to infer that offense was specifically intended. We affirm the trial court's denial of the motion for judgment of acquittal of assault in the second degree.

Admission of Administrative Guilty Findings

Mr. Morton contends that the trial court erred by admitting under the "open door" doctrine testimony that he was found guilty in an administrative proceeding of violating institutional rules prohibiting sexual contact and assault, the door having been opened by his counsel, who had earlier elicited testimony that Mr. Morton was found not guilty of engaging in a disruptive act and committing or conspiring to commit masturbation in the

same administrative proceeding. He argues that evidence admissible through the "open door" doctrine must respond to either competent evidence or incompetent evidence admitted over objection, and the testimony his counsel elicited was neither. He further contends that even if the door was opened to State's responsive testimony, that evidence was unfairly prejudicial. The State responds that admission of testimony regarding the two guilty charges was permitted under the "open door" and "curative admissibility" doctrines and justified by the unfair prejudice that would have resulted if the State could not cure the misleading inference created by the jury's hearing of administrative acquittals without knowing that Mr. Morton was found guilty of other charges related to that same conduct.

The "opening the door" and "curative admissibility" doctrines are, in general, subsets of rules that allow a party unfairly prejudiced by the admission of certain evidence to mitigate that prejudice by proffering proportional evidence which may, under certain circumstances, be otherwise incompetent, irrelevant, or inadmissible. *See State v. Robertson*, 463 Md. 342, 352–57 (2019) (citing *Little v. Schneider*, 434 Md. 150, 163 n.6 (2013)). The Supreme Court of Maryland adopted in *Clark v. State*, 332 Md. 77 (1993), particular and stringent rules for "opening the door" and "curative admissibility." The effect is that the two doctrines apply to different situations. On the one hand, the opening the door doctrine applies where the basic claim is, "[m]y opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue." *Id.* at 85. On the other hand, the curative admissibility doctrine "permit[s] rebuttal by means of otherwise inadmissible evidence only if the evidence originally submitted [by the opponent] created

significant prejudice and there is a need for a corrective that the counterpuncher may provide inadmissible evidence of his own." *Id.* at 88 (quoting 1 Wigmore on Evidence, § 15 (3rd E. 1940)).

Standard of Review

"A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion." *Robertson*, 463 Md. at 353 (citing *Hopkins v. State*, 352 Md. 146, 159 (1998)). We will "not disturb a trial court's evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Joiner v. State*, No. 1949, Sept. Term, 2023, 2025 WL 1540485, slip op. at *18 (App. Ct. Md. May 30, 2025) (quoting *Bey v. State*, 228 Md. App. 521, 535 (2016)). "An abuse of discretion occurs when the trial court's decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Id.* (quoting *Moreland v. State*, 207 Md. App. 563, 568–69 (2012), *aff'd*, 452 Md. 255 (2017)). The trial court's discretion when controlling the scope of redirect examination is "wide," and "particularly wide 'where the inquiry is directed toward developing facts made relevant during cross examination or explaining away discrediting facts.'" *Id.* (quoting *Daniel v. State*, 132 Md. App. 576, 583 (2000)).

"Whether an opening the door doctrine analysis has been triggered is a matter of relevancy, which this court reviews *de novo*." *State v. Heath*, 464 Md. 445, 457 (2019) (citing *Robertson*, 463 Md. at 353). "A trial court does not have discretion to admit irrelevant evidence." *Id.* at 457–58 (citing *State v. Simms*, 420 Md. 705, 724–25 (2011)).

Opening the Door

The "opening the door" doctrine is a rule of expanded relevancy that permits trial courts to admit otherwise irrelevant evidence in response to either "(1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection." *Clark*, 332 Md. at 84–85. There are two main limitations on what may be offered as responsive to the issue generated by the opposing party's evidence: responsive evidence must still be competent in all ways other than its relevancy, and it must not be unfairly prejudicial to the opposing party. *Id*. at 87.

Regarding the former limitation: "The 'open the door' doctrine, does not . . . permit the admission of incompetent evidence – evidence that is inadmissible for reasons other than relevancy." *Battle v. State*, 252 Md. App. 280, 313 (2021) (quoting *Daniel*, 132 Md. App. at 591); *see also Conyers v. State*, 345 Md. 525, 546 (1997) (quoting *Clark*, 332 Md. at 85) ("Generally, 'opening the door' is simply a contention that *competent* evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue."). This requirement is grounded in the logic of the rule as one of "expanded relevancy," *Clark*, 332 Md. at 84, which "makes relevant what was irrelevant." *Battle*, 252 Md. App. at 313 (quoting *Robertson*, 463 Md. at 352). What operates to "expand" what is relevant in a particular case is the explicit judicial determination, prompted by an objection, that particular evidence should be admitted, rather than just the admission of the evidence without an objection. *See Lockhart v. Commonwealth*, 18 Va. App. 254, 262 (1994) (citing *Clark*, 332 Md. at 77). The limitation

requiring rebuttal evidence to be otherwise competent ensures that the "open door" exception does not "supersede the established rules of evidence." *Id*. Further, failure to enforce the requirement of opening the door that inadmissible evidence be objected to would "encourage counsel not to object to inadmissible evidence." *Id.*

As to second limitation on the "opening the door" doctrine: rebuttal evidence is subject to exclusion 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." *Clark*, 332 Md. at 87; *see also Heath*, 464 Md. at 461 (applying Md. Rule 5-403). "The doctrine is to prevent prejudice and is not to be subverted into a rule for the injection of prejudice." *Savoy v. State*, 64 Md. App. 241, 253 (1985) (quoting *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971)). We relied on the Second Circuit's reasoning:

> It makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by "opening the door" so wide that rebutting collateral, inflammatory, and highly prejudicial evidence may enter the minds of the jurors. In short, a small advantage improperly obtained does not compel the exaction of a gross disadvantage in penalty, particularly where a tarnished verdict is the inevitable result.

Id. at 254 (quoting *United States v. Beno*, 324 F.2d 582, 588–89 (2d. Cir. 1963)).

Here, the "opening the door" doctrine does not permit admission of the testimony of Mr. Morton's administrative convictions elicited by the State because the testimony was not competent evidence, and it was not admitted in response to either admissible evidence or evidence which was admitted over objection. As inadmissible hearsay, the evidence is not irrelevant but otherwise competent evidence whose relevancy is established through

the "expanded relevancy" of the "open door" doctrine but rather is evidence whose admission through an "open door" would subvert the evidentiary rules' purpose in ensuring the reliability of the evidence presented to the jury. Second, the testimony is offered in response to evidence which was admitted without objection. We recognize the problems inherent in the proffer of testimony which tends to establish that Mr. Morton was not found guilty of administrative violations relating to the conduct for which he is on trial, particularly when that testimony does not present the full picture of the proceedings, but those problems are not appropriately addressed in the instant matter by use of the "open door" doctrine. The doctrine does not permit the State to elicit otherwise inadmissible testimony to Mr. Morton's guilty findings in administrative proceedings in response to also inadmissible non-guilty findings regarding that same conduct which were admitted without objection.

Curative Admissibility

The doctrine of "curative admissibility," though comparable to the "open door" doctrine, "is more limited and applies where a party wishes to offer incompetent evidence in response to incompetent evidence offered by the opponent which was admitted *without objection*." *Clark*, 332 Md. at 88. Six criteria must be satisfied before a trial court may exercise its discretion to admit inadmissible evidence in response to other inadmissible evidence admitted without objection:

> (1) prejudicial evidence was admitted without timely objection or timely motion to strike;

(2) the failure to object or move to strike was not shown to be an intentional or tactical decision in order to admit the "curative evidence";

(3) the inadmissible evidence is highly prejudicial and a motion to strike the previously admitted evidence and a cautionary instruction would not cure its prejudicial effect;

(4) the "curative" inadmissible evidence goes no further than neutralizing previously admitted inadmissible prejudicial evidence without injecting additional issues in the case and does not allow the curing party to gain a tactical advantage from the failure to object to inadmissible evidence;

(5) the curative inadmissible evidence is of the same character as the previously admitted inadmissible evidence; and

(6) the probative value of the otherwise inadmissible curative evidence outweighs the danger of "confusion of the issue or misleading the jury or by consideration of undue delay, waste of time, [etc.]" *See* Fed.R.Evid. 403.

Id. at 90–91. These criteria are so stringent that "the rule of curative admissibility might better be called the 'rule against curative admissibility' since the rule is more of a general prohibition against admissibility than a general rule in its favor." *Id.* at 88. The Court explained:

> That the curative admissibility doctrine is not frequently invoked is evidenced by the fact that the much more familiar way to "cure" inadmissible evidence admitted without timely objection is to appeal to the court's discretion to grant a belated motion to strike the evidence and to deliver a curative instruction to the jury to disregard the inadmissible testimony.

Id. at 88–89. It recognized, however, that in rare situations, "merely striking out the irrelevant evidence is not sufficient to erase the prejudice it caused," so admission of "irrelevant *and* incompetent evidence" may be permitted to counter the prejudice, as long as the evidence "would go no further than neutralize the previously introduced inadmissible evidence." *Id.* at 89. We shall apply the six rules to the instant case.

The satisfaction of the first requirement, that prejudicial evidence was admitted without timely objection or motion to strike, is evident and not contested by either party.

The second requirement, however, that the failure to object or move to strike was not shown to be an intentional or tactical decision in order to admit the curative evidence, is debated. Mr. Morton argues that the trial court "expressly found" that the State failed to object to the inadmissible hearsay because the admission of that evidence would permit it to offer particular evidence in rebuttal. The State argues that we cannot rely upon the court's "assumption" made "without evidence or a representation by the State" and that there are no other indications that the failure to object was tactical. The court did observe that the State's failure to object had a tactical justification, but the observation in this case is not dispositive as to whether the State in fact intentionally sought a tactical advantage in failing to object to the evidence. This is because: first, the absence of any comment to any effect regarding the evidence by the State; second, Mr. Morton's attempt to admit evidence of some of the administrative charges and its later objection to the remainder of the administrative charges; and third, the quickness with which Mr. Morton pivoted to alternate inquiry during the course of the testimony. Given these conditions, it does not appear that the failure to object was made in an effort to gain a tactical advantage.

Regarding the third requirement, that the inadmissible evidence is unfairly prejudicial and such prejudice is incurable by a motion to strike and a cautionary instruction, Mr. Morton argues that the violations of which he was found not guilty—engaging in a disruptive act and masturbation—were dissimilar enough from the charges

at trial that the typical remedies would have alleviated their alleged prejudicial effect. The State contends that the prejudice inherent in the incomplete picture resulting from the jury's knowledge of the not guilty findings, but not the guilty findings, is high and is incurable particularly in light of the implication that the State could not make its case on a less demanding standard of proof. We have previously related the following commentary by the Supreme Court of Delaware, when confronted with, on retrial, the admission of testimony of conviction of the same charges in the initial trial:

> we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged. It seems unreasonable to expect a juror to divorce from his deliberative process, knowledge that a defendant had been previously tried and convicted, and following a reversal has once again been subjected to prosecution.

Coffey v. State, 100 Md. App. 587, 601 (1994) (quoting *Bailey v. State*, 521 A.2d 1069, 1076 (Del. Supr. 1987)); *see also Hughes v. State*, 490 A.2d 1034, 1044 (Del. 1985); *State v. Crutchfield*, 318 Md. 200, 211 (1989). Here, though the testimony was to an acquittal in an administrative proceeding rather than conviction in a previous criminal trial, the prejudice is similar, at least in kind if not degree. And though the prejudice is slightly undermined by the dissimilarity of charges to those at the instant trial, the impression created by jury's knowledge of determinations in other settings regarding the same incident ranks with the most extreme creators of prejudice to, in this case, the State's case. And neither motion to strike nor curative instruction is likely to dissipate such an impression considering the perception of gravity and finality usually attendant to any deliberative or administrative process.

The analysis of the fourth, fifth, and sixth elements dovetail in the instant matter. The fourth element requires that the "curative" inadmissible evidence goes no further than neutralizing previously admitted inadmissible evidence without injecting additional issues into the case or allowing the curing party to gain a tactical advantage from the failure to object to inadmissible evidence. The fifth and sixth elements contemplate the character of the "open door" evidence in comparison to that which it seeks to rebut and the probative value of the evidence in relation to its potential for prejudice, confusion of the issues, misleading the jury, or wasting of time, among other things. Here, the evidence of guilty findings from the same administrative proceeding is notably of almost identical character of the evidence whose prejudice it is offered to rebut. And the trial court stymied the further injection of additional issues in the case by prohibiting the admission of the document containing the charges. The *Clark* court explained that the parties may fight fire with fire, and "[l]itigants have a limited right to contain trial fires which they had no party in starting by using defensive fire of the same size and character if, by doing so, they will not damage any other aspects of the trial." 332 Md. at 91. Evidence of guilty findings in the administrative proceeding here goes no further than neutralizing the prejudice created by evidence of not guilty findings in the same proceeding. Considering the difficulty in ridding the jury of the impression created by the knowledge of acquittal in the administrative proceeding through a motion to strike or a curative instruction, the most efficient method of removing the stain of prejudice created by the admission of the not guilty findings that the defense sought to admit was to simply admit evidence regarding the entirety of the

proceedings. Mr. Morton, having created an issue, "cannot now be heard to complain that the State sought to rebut its significance." *Trimble v. State*, 300 Md. 387, 403 (1984).

The rule of *Clark* is that when all six criteria are satisfied, the trial court has discretion to permit inadmissible evidence to counter other inadmissible evidence admitted without objection. The criteria having been satisfied, the court's determination that the only appropriate remedy to the prejudice created by Mr. Morton's elicitation of inadmissible evidence was through the generally inadmissible evidence permitted by the curative admissibility doctrine. Given the nature of the prejudice created by the defense and the proportionality of the rebuttal evidence, we do not find that the court abused its discretion.

CONCLUSION

The trial court did not err in denying Mr. Morton's motions for judgment of acquittal of fourth degree sexual offense and second-degree assault nor in admitting the evidence of guilty findings from internal administrative hearings.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.