Circuit Court for Baltimore City
Case No.: 116267016, 017

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 163

September Term, 2021

CHARLES SHELTON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Leahy, J.

Filed: March 3, 2022

This case involves the heartbreaking death of three-year-old R.P. Appellant, Charles Shelton, was charged in the Circuit Court for Baltimore City in two indictments arising out of this tragedy which occurred on September 1, 2016. The first indictment was for first degree murder of R.P. and related offenses, and the second indictment was for the second-degree assault of R.P's mother, D.P., and related offenses.[1]

D.P. and Mr. Shelton were the only two people to witness what happened to R.P., and they each testified at Mr. Shelton's trial that the other was to blame. The jury convicted Mr. Shelton of second-degree child abuse and reckless endangerment and acquitted him of the remaining charges relating to R.P. With regard to D.P., the jury convicted him of second-degree assault and reckless endangerment. Mr. Shelton was sentenced to the following consecutive sentences for a total of 35 years' incarceration: 15 years for second-degree child abuse of R.P.; five years for reckless endangerment of R.P.; ten years for second-degree assault of D.P.; and, five years for reckless endangerment of D.P. In this belated appeal, Mr. Shelton asks us to address the following questions:

> "1. Did the circuit court err in permitting Detective [Michael] Moran to testify that D.P. told the truth, in violation of the holding in *Bohnert*?[2]
>
> 2. Did the circuit court improperly restrict cross-examination of Detective Moran by excluding information about the basis for his lay opinion that D.P. told the truth?

[1] It is unnecessary to name the minor victim or his mother in this case. *See generally Muthukumarana v. Montgomery County*, 370 Md. 447, 458 n.2 (2002); *Thomas v. State*, 429 Md. 246, 252 n.4 (2012).

[2] *Bohnert v. State*, 312 Md. 266 (1988).

3. Must the five-year sentence for reckless endangerment merge into the ten-year sentence for second-degree assault with respect to D.P.?"

We conclude that Detective Moran gave inadmissible testimony on direct examination when he stated that D.P. told him the truth, but we hold that the circuit court did not commit reversible error because the error was invited by defense counsel in opening arguments. Because the defense referred during opening to the fact that D.P. gave the police two conflicting accounts of what happened to her and R.P., the circuit court did not err by admitting Detective Moran's testimony on direct examination explaining that he asked D.P to tell him what really happened after he thought the story she was telling the police initially wasn't "adding up." We also hold that the circuit court did not commit reversible error by limiting Detective Moran's testimony about D.P.'s statements on cross-examination because the same information was later elicited directly from D.P., making any error harmless. Finally, we agree with both parties that Mr. Shelton's five-year sentence for reckless endangerment of D.P. merges into his 10-year sentence for second-degree assault of D.P. Accordingly, we vacate Mr. Shelton's sentence for reckless endangerment of D.P. but otherwise affirm the judgment of the circuit court.

BACKGROUND

On the date of the tragedy, September 1, 2016, R.P. lived at a residence in Baltimore City with his mother, D.P., and her then-boyfriend of about six months, Mr. Shelton. R.P's aunt and grandmother also lived in the home with them. D.P. testified at trial that on that day, at around 2:30 a.m., she was awakened in her first-floor bedroom to find Mr. Shelton tossing R.P. into the air. D.P. asked Mr. Shelton to put R.P. back to bed. Mr. Shelton

declined after noticing that R.P. had urinated and took him upstairs to the bathroom to change him. Mr. Shelton momentarily returned to the first-floor bedroom, with R.P.'s soiled underwear, then went back upstairs. At that point, D.P. heard Mr. Shelton striking R.P.

D.P. related that she went up the stairs and saw Mr. Shelton repeatedly hitting R.P. in the chest with a closed fist. D.P. attempted to grab R.P. away from Mr. Shelton, but Mr. Shelton would not let her. D.P. testified that R.P. was having trouble breathing and, at one point, vomited. In response, Mr. Shelton picked up R.P. and threw him on a bed in a nearby second floor bedroom. He picked him up again off that bed, and then threatened to throw him down the stairs. Ultimately, Mr. Shelton took R.P. back downstairs to their shared bedroom on the first floor, threw him on their bed and, according to D.P., started "smacking" him on the "butt, open hand. He wouldn't stop."

According to D.P., Mr. Shelton picked R.P. up again and threw him on his own bed and started punching him, again, repeatedly, in his chest and stomach with a closed fist. At that point, Mr. Shelton turned on D.P. and started stomping on her head and thigh with his foot. The ongoing incident continued into the kitchen area, where D.P. testified that Mr. Shelton choked her until she passed out. When she regained consciousness, D.P. tried to go back to the bedroom where R.P. still lay on his bed, but Mr. Shelton grabbed her in the hallway and, according to her testimony, "tried to break [her] neck."

Back in the bedroom again, Mr. Shelton started "stomping" on R.P. with his foot. According to D.P., Mr. Shelton got up on the bed, stood over R.P., and "stomped" on his head and stomach area. At some point, R.P. began "spitting up blood[.]" D.P. continued

to try to extricate R.P. to no avail. Mr. Shelton then accosted her again, called her names and told her that he hated her and R.P., and then he choked her a second time into unconsciousness.

When she woke up on the floor, D.P. saw R.P. lying on his side next to her and Mr. Shelton standing over both of them. Mr. Shelton then grabbed R.P. with both hands around the neck and started choking him. D.P. told the jury that she tried to get Mr. Shelton's hands off R.P.'s neck and stated, "Stop, you're killing him" to which Mr. Shelton replied, "No, he's not dead yet."

Mr. Shelton then dropped R.P. and D.P. pleaded with him to allow her to take R.P. to the hospital. She testified that R.P. was unconscious and non-responsive. D.P. put clothing on R.P. Mr. Shelton demanded that she put makeup on herself and R.P. to cover their bruises and, when she declined, Mr. Shelton punched her in the chest. He then found the makeup kit and put it on both of them. He also threatened her with a kitchen knife at around this time, but relented when she again pleaded with him to let her take R.P. to the hospital. She agreed that she did not call an ambulance, testifying that she could not find her phone and that the hospital was located only about five to ten minutes away.

Mr. Shelton then drove the three of them to University of Maryland Medical Center. Along the way, he told D.P. to say that R.P. fell down the steps, or to say that she and R.P. "were jumped." D.P. testified that once they arrived, Mr. Shelton warned her that "if I go in there and tell the truth, he'll come in there and kill both of us." D.P. then took R.P. inside for treatment. R.P. was moved to I.C.U. and then died three days later.

The State's first witness at trial was Detective Michael Moran. He informed the jury that he responded to University of Maryland Medical Center and learned that R.P. "was in grave condition and was probably [sic] wouldn't survive his injuries." He also saw D.P. talking to another officer. She was "crying" and "upset," and he noticed that she had a bloody nose, a swollen lip, and was "bruised" with "swelling under her eye, scratches on her arm."

After first speaking with the head of the pediatric unit about the incident, Detective Moran spoke to D.P. During both his direct- and cross-examination, the detective did not relay any details of any conversation with D.P. He testified, over objection, that her initial statements were not "adding up," and that she eventually told him "the truth of what happened."[3]

Following this conversation with D.P., Detective Moran went outside the front of the hospital and found Mr. Shelton standing near a vehicle, smoking a cigarette. The detective introduced himself and asked Mr. Shelton to come to the police station to speak to him further. Mr. Shelton agreed and was transported to the station by another officer.

During the subsequent interview at the station, Mr. Shelton told Detective Moran that he had a "boxer fracture on his right hand" and admitted that he was right-handed. Photographs of Mr. Shelton's hands were admitted for the jury, and the detective testified, without objection, that Mr. Shelton's right hand appeared to be swollen.

[3] Additional details relating to this portion of Detective Moran's testimony are discussed later in this opinion.

Detective Moran explained that at the conclusion of Mr. Shelton's interview, he was moved into a holding cell, and that after consulting with the State's Attorney, Detective Moran prepared a charging document. The document charged Mr. Shelton with attempted first-degree murder, child abuse, domestic assault, and related charges. When R.P. was pronounced dead approximately three days later, Detective Moran wrote another warrant charging Mr. Shelton with first degree murder.

Returning to D.P.'s testimony, she related that the assaults in her residence lasted approximately three hours until they left for the hospital at around 5:30 a.m. She explained that she originally told the police the version of events that Mr. Shelton ordered, i.e., "the story about being jumped" because she was "still scared[.]" She confirmed that she then provided a different account of the incident to Baltimore City Detective Michael Moran, identifying Mr. Shelton, who was standing outside in a no-parking area, as the man who committed the assaults. More specifically, D.P. testified as follows:

[THE STATE]:	At some point, did Baltimore City Police detectives arrive?
[D.P.]:	Yes.
[THE STATE]:	And what happened when they arrived?
[D.P.]:	Detective Moran had pulled me to the side and I remember him saying, "We know this was somebody that you know personally."
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Okay. Don't tell us anything that anyone told you. Okay?
[D.P.]:	Okay.

THE COURT:	I sustain the objection.
[THE STATE]:	Based on your conversation with Detective Moran, what, if anything, did you do or say?
[D.P.]:	I just remember breaking down and crying, and then he asked me if the person was in the car and I said, "yes." Then we went into one of the hospital bedroom things, to the side, and he sat me down and asked me what happened.
[THE STATE]:	Did you tell him what happened?
[D.P.]:	Yes.
[THE STATE]:	Did you identify the defendant as the person who did it?
[D.P.]:	Yes.

On cross-examination, D.P. confirmed that she never told the police that Mr. Shelton threatened to throw R.P. down the stairs. She also did not believe she told anyone that Mr. Shelton stomped on her head or tried to break her neck. D.P. also did not remember how long she lost consciousness during the incident. Asked why she did not leave or attempt to contact anyone during the three-hour incident, D.P. testified, "[m]y fear was that he would have completely killed [R.P.]"

Following the conclusion of the State's case-in-chief, Mr. Shelton testified, claiming that D.P. was the actual cause of R.P.'s fatal injuries. Mr. Shelton related that on the day in question, Mr. Shelton had asked D.P. to pick him up from some place in the Lakeland neighborhood at around 2:30 - 3:00 a.m. He explained that R.P. was sleeping in the back of the car in his car seat, and that D.P. would not speak to him. He said that D.P was still mad at him because she had caught him cheating with other women. When they arrived at

the house, Mr. Shelton put R.P. in his bed and then, after D.P. would not let him sleep in their shared bed, he got into bed with the child and fell asleep. He woke up at some point thereafter to D.P. punching him in the cheek with a closed fist.

Mr. Shelton explained that D.P. had gone through his cellphone while he was asleep. Based on that, she got upset and started yelling at him. D.P. called him names, said she was "going to fuck [him] up," and then slapped him. Mr. Shelton admitted that he grabbed her by the arms and punched her in the legs. He also stated that he pushed her "hard," and tried to leave the room.

During the ensuing argument, Mr. Shelton noticed that R.P. had urinated in his underwear and went to pick him up. This angered D.P. and she told him to "[p]ut my fucking son down." Mr. Shelton carried R.P. towards the steps, and D.P. continued to fight him along the way. According to Mr. Shelton, she then took two swings at Mr. Shelton, the first one hitting Mr. Shelton in the collarbone and the second one hitting R.P. Mr. Shelton testified that "[t]he second one connected in, like, right next to his temple and then one behind his ear. That's how he got the bruise behind his ear." A third punch by D.P. also hit R.P.

At that point, Mr. Shelton retaliated and hit D.P. in the eye. According to him, "that's when she just went berserk." D.P. started punching wildly and Mr. Shelton testified that R.P. "absorbed like a good number of punches." D.P. punched R.P. in the stomach and he "defecated in my arms." Mr. Shelton told D.P. that she was hitting the baby and she replied by accusing him of using R.P. to block her, apparently as a shield. Mr. Shelton estimated that D.P. hit R.P. fourteen to fifteen times.

Mr. Shelton then took R.P. upstairs to change him in the bathroom. When he returned downstairs, he and D.P. continued to argue, and he laid R.P. down on his bed. He noticed that R.P.'s breathing was shallow, that he was "cross-eyed," and that his body was "limp and his head went back." He also clarified that he thought R.P. "wasn't breathing at all. I wanted to give him CPR, but his jaw was locked."

Mr. Shelton told D.P. to call an ambulance but she refused, stating "I'm not calling an ambulance. You're not his biological father. We're going to go to jail." Mr. Shelton replied, "We're going to go to jail if we don't go to the hospital." They then decided to drive R.P. to the hospital, but D.P. first grabbed her makeup "to cover up the bruising because they're going to ask us both questions."

Mr. Shelton then testified that he was interviewed by Detective Moran at the police station. He agreed that he did not tell the detective that D.P. hit R.P. He explained that he did not want her to get in trouble. He also testified he was not totally honest with the police because "[s]he's the mother. She would be the one to be the caretaker. I didn't want to get her in further trouble than she already was – that we already were."

Mr. Shelton denied telling D.P. to tell the police that three men jumped her and R.P. He denied physically harming R.P. in any way on the day in question. He testified that D.P. was the person who harmed R.P. and caused his death.

On cross-examination, Mr. Shelton confirmed that he did not tell the police that D.P. hit R.P. He agreed that his initial story to the police was that D.P. called him and was "hysterical" and that he should meet her at the hospital. In that version of events, Mr. Shelton did not know what was going on. In his second version of events to police, Mr.

Shelton agreed that he told them that he and D.P. were arguing, D.P. hit him, and R.P. fell off the bed. He confirmed that, at no time did he tell Detective Moran, "Wait, man, it wasn't me."

Mr. Shelton also agreed that, on September 1, 2016, at around 6:00 p.m., he called his mother and told her that R.P. fell down the stairs. He also called his mother the next day and maintained this same version of events. He never told his mother, in these conversations, that D.P. struck R.P.

Mr. Shelton further agreed that, on September 7, 2016, at around 10:18 a.m., and after R.P. died, he spoke to D.P. and claimed that he did not remember anything whatsoever about the night of the incident. He also agreed that he kept asking D.P., "[d]o you want to send me away?" and did not ask about R.P. On redirect examination, Mr. Shelton confirmed that he was incarcerated during the aforementioned phone calls and that he was aware that his calls were being monitored and recorded.

On September 8, 2017, Mr. Shelton was found guilty of one count of second-degree child abuse, two counts of reckless endangerment (one each for D.P. and R.P.), and one count of second-degree assault against D.P.[4] He was sentenced on October 16, 2017. Mr. Shelton was granted the right to file a belated appeal on March 17, 2021, which he then timely filed on March 29, 2021.

[4] He was found not guilty of first-degree murder, second-degree murder, first-degree child abuse, first-degree assault and second-degree assault against R.P.

DISCUSSION

I.

Opinion Evidence

A. Background

In defense counsel's opening statement, he told the jury that D.P. gave two conflicting accounts of what happened to R.P.:

> [W]hen she went in with the child and was first asked by the nurse you are going to hear, that she first told the nurse that three . . . guys in the Lakeland area jumped her and beat up young [R.P.]. And then when the detective came she tried to hold on to that story. Three guys . . . jumped me and tried to rob me and they are the ones who hurt my son.
>
> Now, this is while she's in the hospital. Away from Mr. Shelton. And in the care of police officers. But the detective says I don't buy that. That don't sound right to me. So then she turned to the next --- over [sic], my boyfriend did it.
>
> Now, as chilling as this may sound . . . the fact of the matter is that [D.P.] killed [R.P.].
>
> * * *
>
> The only thing and the only person that ties Mr. Shelton to this murder is [D.P.]. Who has reason to blame someone else. But for [D.P.] talking to the police officers first, Mr. Shelton wouldn't even be charged.

Detective Moran was the first witness to testify about the contention that D.P. gave two different accounts of what happened. On direct examination by the State, he testified:

> [DETECTIVE MORAN]: I went back to [D.P.]. What she was telling the officer wasn't adding up. Her injuries, the injuries to the baby. Wasn't adding up. I then asked her --
>
> [DEFENSE COUNSEL]: Objection, Your Honor, move to strike.
>
> THE COURT: Overruled. You asked her what?

[DETECTIVE MORAN]: I asked her what is the truth, you know, I said if you are afraid of somebody or somebody is hurting you --

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[DETECTIVE MORAN]: I can protect you, I can help you, please just tell me the truth, what really happened and at which time she told me the truth of what happened.

[THE STATE]: Okay. When you spoke to her how was she acting?

Then, on cross-examination, Detective Moran testified:

[DEFENSE COUNSEL]: Detective, you on direct examination [] just testified to the fact that . . . . That when you first got to the hospital you spoke with another officer who gave you a version of events that [D.P.] had given him -- or her, I'm sorry.

[DETECTIVE MORAN]: She was actually talking to the officer as I was standing there so I was kind of listening in.

[DEFENSE COUNSEL]: Okay. And that version of events you did not believe?

[DETECTIVE MORAN]: No.

[DEFENSE COUNSEL]: It was your opinion that what she was saying at that time was not truthful?

[DETECTIVE MORAN]: Correct.

[DEFENSE COUNSEL]: And what she was saying at the time was –

[THE STATE]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: And after -- so, you confronted her and told her you did not believe her story?

[DETECTIVE MORAN]: I thought there was something more to the story, correct.

[DEFENSE COUNSEL]: Okay. And then she told you a second story, correct?

[DETECTIVE MORAN]: That's correct.

[DEFENSE COUNSEL]: And that second story you choose to believe as the truth?

[DETECTIVE MORAN]: That -- it was the truth. Yes.

[DEFENSE COUNSEL]: But that is just your opinion?

[DETECTIVE MORAN]: My professional opinion, person [sic] opinion, yes, absolutely.

B. Parties' Contentions

Appellant first contends that the court erred by permitting Detective Moran to testify that D.P. told the truth. He argues that this testimony is foreclosed under the holding in *Bohnert v. State*, 312 Md. 266 (1988), which prohibits witnesses from giving opinions on the credibility of other witnesses. In his view, Detective Moran's testimony that he believed D.P.'s second account over her first constituted "an opinion that Mr. Shelton was lying," which was "inadmissible as a matter of law because 'it encroached on the jury's function to judge the credibility of witnesses and weigh their testimony and on the jury's function to resolve contested facts.'" (Quoting *Bohnert*, 312 Md. at 279). Mr. Shelton also argues that "[t]he error cannot be deemed harmless because the contested matter of agency, and the credibility of the witnesses who could testify to it, was the central issue for the jury to resolve."

In response, the State argues that Mr. Shelton was the one who elicited the testimony from Detective Moran that he now finds objectionable. The State does not base this contention on defense counsel's opening statement—rather, the State argues that "at the end of the State's direct examination of [Detective] Moran, there was no evidence to the content of D.P.'s statement to police, such as whether she had given two conflicting stories or had implicated [Mr.] Shelton." Furthermore, the State asserts that it was defense counsel who elicited Detective Moran's opinion that D.P.'s second story was truthful. As a result, the State contends, the invited error doctrine bars Mr. Shelton from appellate relief on this issue.

The State also argues that Mr. Shelton's reliance on *Bohnert* is misplaced. In the State's view, the present case is distinguishable from *Bohnert* because "unlike the expert in *Bohnert*, who directly assessed the testimony of another witness, [Detective] Moran's testimony on direct examination did not assess the testimony or other evidence that was before the jury."

Finally, the State argues that even if Detective Moran's testimony was improper, the error was harmless. The State posits that "[i]t was obvious and inconsequential" that "the State's lead detective[] believed D.P. truthfully implicated [Mr.] Shelton"—and, regardless, the jury had an opportunity to reach its own conclusions about the credibility of D.P. and Mr. Shelton when they testified later in the trial.

In reply, Mr. Shelton contends that the first instance of the detective's inadmissible opinion evidence occurred on direct examination and was unsolicited by defense counsel, and that cross-examination on the issue was entirely appropriate as "an attempt to weaken

the impact of what [Mr. Shelton] considered to be erroneously admitted evidence." *Fullbright v. State*, 168 Md. App. 168, 178 (2006). Thus, Mr. Shelton reasons, the doctrine of invited error is inapplicable. Mr. Shelton also responds that this case involved resolution of two competing versions of events by D.P. and Mr. Shelton and that Detective Moran's testimony "was a thumb on D.P.'s side of the scale weighing their respective levels of credibility" and, therefore, was not harmless.

C. Analysis

Admissibility of Detective Moran's Testimony

Ordinarily, the trial court is given wide latitude in controlling the admissibility of evidence. *Taneja v. State*, 231 Md. App. 1, 11 (2016). A court abuses that discretion when the court acts in an "arbitrary or capricious manner or when [it] acts beyond the letter or reason of the law." *Id.* However, as a matter of law, "in a criminal trial a court may not permit a witness to express an opinion about another person's credibility." *Walter v. State*, 239 Md. App. 168, 184 (2018) (citing *Fallin v. State*, 460 Md. 130, 160 (2018)); *see also Bohnert*, 312 Md. at 277 (recognizing that it is error, as a "matter of law," "for the [trial] court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying"). As the Court of Appeals explained:

> [A] trial court may not ordinarily permit questioning that calls for one witness to assess the credibility of testimony or statements made by another witness concerning the facts of the case. This is not to say that a witness may not offer the jury general information that may be useful to the jury in making the credibility determinations, such as character evidence or tools related to the assessment of credibility.

Fallin, 460 Md. at 154.

In *Bohnert*, the State charged Bohnert with committing a sexual offense in the second degree on a child under the age of 14. The child had "alleged that frequently during the year 1983, Bohnert would take her into the bathroom and cause her to engage in [nonconsensual sex acts.]" *Bohnert*, 312 Md. at 269-70. The child later recanted her allegations and, at trial, "[s]he initially testified that she could not remember anything that had happened between her and Bohnert, [but] eventually, after a short recess, testified, reluctantly it seemed, about what had occurred." *Id.* at 270. Because there was no eyewitness or physical evidence to support the child's story, "[i]t was clearly apparent that the State's case hinged solely" on the child's testimony. *Id.*

To conclude its case in chief, the State called a social worker as an "expert in the field of child sexual abuse." *Bohnert*, 312 Md. at 270-271. The State asked the expert "whether she had 'an opinion as to whether or not [the child] . . . was sexually abused?'" *Id.* at 271. The expert responded in the affirmative, and when asked what her opinion was, stated: "[i]t's my opinion, based on the information that [the child] was able to share with me, that she was, in fact, a victim of sexual abuse." *Id.* Bohnert's counsel objected timely to the expression of this opinion, but presumably was overruled. *Id.* at 271 n.1. Later, "Bohnert took the stand in his own defense and categorically denied the allegations" of sexual abuse. *Id.* at 273.

The *Bohnert* Court described the tenor of the State's case as follows:

> It is perfectly clear, as we have indicated, that the outcome of this case depended on the jury's determination of the credibility of two witnesses, the accuser and the accused. It is equally clear that the opinion of the "expert in the field of child sexual abuse" was of utmost significance in that determination. If the child's allegations were believed, they would establish

both the corpus delicti of the crimes charged and the criminal agency of Bohnert.

The prosecutor fully appreciated the importance of [the expert's] opinion. In his opening argument to the jury he stressed her experience and expertise, called attention to the investigation she conducted, which she was "trained to do," and observed that the "investigation revealed to her that [the child] was, in fact, abused sexually." He declaimed:

> That's her expert opinion. That's what she concluded. There was no other person before you presented by the defense . . . to contradict that. They presented no evidence that no, she wasn't abused.

He asserted:

> You have a very important point . . . an expert in this field saying this child was sexually abused.

He concluded his argument:

> You have an expert opinion in this case this child was sexually abused. It's unrefuted, not disputed, not contradicted and you have [the child's] testimony about what happened and how it happened and you have her testimony . . . about who did it. There's no question about who did it and I ask you to find verdicts of guilty on all counts.

In the State's closing argument, the prosecutor again declared: "You have an expert opinion, that's been unrefuted that [the child] was sexually abused."

Id. at 273-74.

After discussing the evidentiary rules regarding expert opinions, the *Bohnert* Court concluded that the expert's opinion in that case was "founded only upon what [the child] said had occurred." *Id.* at 276. The expert "proffered no evidence as to objective tests or medically recognized syndromes with respect to the child. Nor did [the expert] present any evidence as to the child's behavior compared to general behavioral characteristics of child

abuse victims." *Id.* Further, "[t]here was no physical evidence on which to base the opinion. There were no eyewitnesses." *Id.* Indeed, "[t]he opinion was reached on the child's unsubstantiated averments and 'a certain sense about children' which [the expert] believed she possessed." *Id.* The Court also concluded:

> [The expert's] intuitive reaction to the child's story did not suffice to provide a foundation for the opinion that the child was, in fact, sexually abused. The opinion of [the expert] was not based on facts sufficient to form a basis for her opinion. There were no facts to show that [the child's] allegations were true, so that a reasonably accurate conclusion that the child had been sexually abused could be made. The conclusion that she had in fact been abused was no more than mere conjecture or guess. The short of it is that the very groundwork for [the expert's] opinion was inadequately supported.

Id.

Following this, the Court declared:

> In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury. It is also error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying. The Court of Special Appeals said in *Mutyambizi v. State*, 33 Md.App. 55, 61, 363 A.2d 511 (1976), *cert. denied*, 279 Md. 684 (1977):
>
> > Whether a witness on the stand personally believes or disbelieves testimony of a previous witness is irrelevant, and questions to that effect are improper, either on direct or cross-examination.

Id. at 277 (some citations omitted). *See also Fallin v. State*, 460 Md. 130, 158-59 (2018) (comparing an opinion that another witness's testimony was true or false to evidence derived from a polygraph machine, something that is "widely held to be inadmissible in evidence").

Applying the law to the facts, the Court then held:

> The opinion of [the expert] that [the child] in fact was sexually abused was tantamount to a declaration by her that the child was telling the truth and that Bohnert was lying. In the circumstances here, the opinion could only be reached if the child's testimony were believed and Bohnert's testimony disbelieved. The import of the opinion was clear B [the child] was credible and Bohnert was not. Also, the opinion could only be reached by a resolution of contested facts - [the child's] allegations and Bohnert's denials. Thus, the opinion was inadmissible as a matter of law because it invaded the province of the jury in two ways. It encroached on the jury's function to judge the credibility of the witnesses and weigh their testimony and on the jury's function to resolve contested facts. Inasmuch as the opinion was inadmissible as a matter of law, it was beyond the range of an exercise of discretion. In ruling on a question of law a judge is either right or wrong, and discretion plays no part. In this case he was wrong. We hold that the receipt in evidence of [the expert's] opinion that the child "was, in fact, a victim of sexual abuse," constituted reversible error.

Bohnert, 312 Md. at 279-80. And "the error in permitting the opinion of the 'expert' to go before the jury could in no event, under the circumstances of this case, be harmless under the test enunciated in *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976)." *Bohnert*, 312 Md. at 279 n.3.[5]

Bohnert was by no means the last authority on the subject. In *Fallin v. State*, the defendant was accused of sexually abusing his daughter. 460 Md. 130, 132 (2018). The primary evidence was provided by the daughter, 460 Md. at 139-40, but the jury also heard from a forensic examiner, who offered testimony, over objection, that she did not observe

[5] Detective Moran testified as a lay witness in this trial. The State does not dispute that the general rule in *Bohnert* applies to witnesses, lay and expert alike. *See Bohnert*, 312 Md. at 278 ("It is the settled law of this State that a witness, *expert or otherwise*, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law") (emphasis added).

any signs that the victim's story was fabricated or that she had been coached, *id.* at 146. In assessing these opinions, the Court of Appeals reiterated:

> a fundamental principle underlying trial by jury is that "the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." Accordingly, a trial court may not ordinarily permit questioning that calls for one witness to assess the credibility of testimony or statements made by another witness concerning the facts of the case. This is not to say that a witness may not offer the jury general information that may be useful to the jury in making the credibility determinations, such as character evidence or tools related to the assessment of credibility.

Id. at 154 (quoting *Bohnert*, 312 Md. at 277).

Acknowledging that expert testimony may be helpful in cases of child sexual abuse, the Court concluded that the expert in *Fallin* went too far, stating that she "did not so much advise the jury on how to assess a witness for signs of fabrication as provide her own conclusions on the credibility of the primary prosecution witness." *Id.* at 156. The Court summarized its holding as follows:

> In its effort to support the testimony of its main – and essentially only – witness, the prosecution elicited what amounted to an endorsement of the credibility of an out-of-court statement by that witness that the jury did not see and could not evaluate for itself. It consisted of the expert opinion of [the forensic examiner] that there were no "signs" – and no need for "concern" – that the out-of-court statement was fabricated or coached. That testimony crossed the line that this Court drew in *Bohnert* and *Hutton*. We must reverse and remand for a new trial.

Id. at 161; *see Hutton v. State*, 339 Md. 480, 507 (1995) (providing that, in child sexual abuse cases, an expert's role is "that of an educator, 'supplying the jury with necessary information about child sexual abuse in general, without offering an opinion as to whether a certain child has been sexually abused'" (citation omitted)).

Standing in contrast to *Bohnert* and *Fallin* is the case of *Conyers v. State*, 354 Md. 132 (1999). There, a prosecution witness, Charles Johnson, had testified for the State about inculpatory statements he had heard Conyers make while they were cellmates. *Id.* at 151-52. The defense sought to undermine Johnson's credibility by attempting to show that he most likely had obtained this information through his habit of rifling through the "charge papers" of inmates in the prison. *Id.* at 152. In rebuttal, the State called Detective Philip Marll, who was asked when he met Johnson was there any information above and beyond that contained within Conyer's charging documents and a search warrant, to which Marll replied:

> Yes, sir. There was a significant number of statements that were made by Mr. Johnson, some factual statements that were made by Mr. Johnson that were not included in the application for statement of charges and/or the affidavit for the search and seizure warrants that myself and my partner obtained. *These statements which I knew upon hearing them from Mr. Johnson to be truthful, and I was able to verify each and every statement that he gave us.*

Id. at 153 (emphasis in original).

Conyers argued on appeal that the emphasized portion of Marll's testimony was improper and prejudicial because it was an opinion on Johnson's credibility. *Id.* at 153. After initially noting that Conyers' claim was not preserved, *id.*, the Court of Appeals nevertheless addressed it on the merits and found that the reliance on *Bohnert* was misplaced. *Id.* at 153-54. The Court found that Detective Marll was not offering an opinion as to Johnson's credibility as a witness. *Id.* at 154. Instead, "Marll was stating that certain information Charles Johnson had supplied him with prior to trial was not contained in Appellant's papers and, because he was able to confirm that information, he regarded it as

accurate and, therefore, truthful." *Id.* Further, the underlying purpose of Marll's testimony was to demonstrate that Johnson could only have obtained the information from Conyers, and to establish that the information Johnson obtained was only known to the killer and the investigating officers, and thus Johnson could only have learned the information from the person who committed the murder. *Id.* The Court found that for these reasons, Detective Marll's testimony did not invade the province of the jury. *Id.*

The Court of Appeals subsequently clarified this part of *Conyers* as follows:

> *Conyers* does not stand for the proposition that a witness may testify that another witness told the truth. The Court explicitly disclaimed such a holding, concluding that the detective was not offering opinion as to Johnson's credibility as a witness generally. Rather, the detective was testifying that certain information provided to him by Johnson was confirmed by other information known to the detective - and not available from Conyers' charging papers. Such testimony, the Court held, did not invade the jury's function of determining the credibility of witnesses.

Brooks v. State, 439 Md. 698, 732 (2014); *see also Tyner*, 417 Md. at 618-21 (no error to permit police witness testify that a witness, appearing pursuant to a cooperation agreement, had an obligation to testify truthfully); *Nero v. State*, 144 Md. App. 333, 354-57 (2002) (detective's testimony that eyewitnesses who picked defendant's photograph from arrays were "very certain," did not invade the province of the jury).

This Court's more recent decision in *Walter v. State*, 239 Md. App. 168 (2018) is also instructive here. In that case, the appellant was accused of sexually abusing a minor. *Id.* at 175. After the allegations by the minor victim came to light, the appellant voluntarily sat for an interview with a detective. *Id.* at 182. At trial, "[o]ver a defense objection, the

State played a largely unredacted video-recording of [the detective's] interview with [the appellant]." *Id.*

> In the interview, which spans 61 pages, [the appellant] repeatedly denied all of [the minor's] allegations. . . .
>
> Throughout the interview, the detective employed a number of common investigative techniques in an effort to cause [the appellant] to change his account. She challenged him on whether [the minor] was lying. She repeatedly asked him to explain why [the minor] would suddenly make these allegations, and she disparaged his explanations. On multiple occasions, she expressed the opinion that he had sexually abused [the minor]. She also expressed disbelief in his denial of culpability. . . . Her techniques, however, had little discernible impact on [the appellant's] account.

Id. at 182-83.

On appeal, the appellant challenged his conviction for sexual abuse of a minor, arguing that the trial court erred by admitting the recording of his interview with the detective without redacting the detective's comments and questions that expressed disbelief in his denials of culpability. *Id.* at 184. We agreed with the appellant, holding that "the detective's expressions of disbelief were irrelevant and inadmissible." *Id.* at 189. Additionally:

> [E]ven if we assumed that the detective's comments might have some relevance in providing context for [the appellant's] responses, the fact is that few, if any, of [the appellant's] responses were more than minimally probative in the State's case. The questions did not impel [the appellant] to inculpate himself or to alter his account. To the contrary, [the appellant's] account remained largely the same throughout the interview.

Id. at 189-90. We also held that the error was not harmless beyond a reasonable doubt. *Id.* at 192. Because there was "no physical evidence and no confession," the prosecution "depended largely upon [the minor's] credibility, which was subject to question, not least

because of the discrepancies in her several accounts." *Id.* And "in deciding whether to believe [the minor], the jury could assess [the appellant's] demeanor in the recorded interview and the credibility of his denials." *Id.* Accordingly, we could not discount the possibility that the detective's commentary on the appellant's credibility had an unfairly prejudicial effect on the jury's assessment of his guilt. *Id.*

Mr. Shelton's case is not easily comparable to any of the cases we have discussed, though they contain the precepts that we must apply in our analysis here. Detective Moran's testimony had some similarity to the testimony in *Bohnert* and *Fallin* because in all three cases, a witness for the State expressed an opinion that a victim was truthful in a statement about a defendant's culpability. *Fallin*, 460 Md. at 160-61; *Bohnert*, 312 Md. at 279. But here, significantly, unlike in *Bohnert* and *Fallin*, Detective Moran never testified about the content of D.P.'s statements. He testified about the circumstances in which D.P. gave the two statements. Detective Moran requested the second statement because what he heard D.P. telling the other officer wasn't "adding up" to him, and she eventually told him "the truth of what happened."

We also do not think that this case is directly comparable to *Conyers*. In *Conyers*, it was "clear that [Detective] Marll was not offering an opinion as to Charles Johnson's credibility as a witness." 354 Md. at 154. Instead, Detective Marll was using his own independent personal knowledge of facts to demonstrate the source of Charles Johnson's knowledge. *Id.* Here, nothing in the record indicates that Detective Moran had any independent knowledge of the facts that would allow him to comment on truth of D.P.'s statements.

This case is also not directly comparable to *Walter*. As we stated in *Walter*, "[c]ases like *Bohnert* . . . and *Fallin* concern what [a witness] can say at a trial," and so does the present case. 239 Md. App. at 187. *Walter*, on the other hand, concerned the admissibility of an out-of-court statement made by a police officer in an interview with a suspect before he was charged. *Id.*

We conclude, therefore, that Detective Moran's testimony that D.P. "told [him] the truth of what happened," was inadmissible, although the error in admitting the testimony was less severe than that in *Bohnert* and *Fallin* because Detective Moran said nothing about the content of D.P.'s statement. Still, by stating that D.P. "told [him] the truth of what happened," Detective Moran expressed an opinion on D.P.'s credibility, which "encroached on the jury's function to judge the credibility of the witnesses and weigh their testimony and on the jury's function to resolve contested facts."[6] *Bohnert*, 312 Md. at 279.

Invited Error

Although we conclude that Detective Moran's comment about D.P. telling the truth was inadmissible, we nevertheless hold that the circuit court did not commit reversible error because the error was invited by defense counsel in opening statements. We explain.

"Under the 'invited error' doctrine, 'a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from that error.'" *Smith v. State*, 218 Md.

[6] We also note that in the State's closing arguments, the State said that "Detective Moran has been a homicide detective for years here. He told you, 'Yeah, it's my professional opinion that the defendant committed this crime.' With all his years in homicide, certainly he has the knowledge to base his opinion on." **[T2 at 230].** However, defense counsel did not object to these comments, so any claim of error arising from them was not preserved. Maryland Rule 8-131.

App. 689, 701 (2014) (quoting *State v. Rich*, 415 Md. 567, 575 (2010)); *see also Klauenberg v. State*, 355 Md. 528, 544 (1999) ("The question at issue, however, was asked *by* appellant to the State's witness on recross examination. Because appellant invited the error of his testimony and did not object to the answer given by [the witness], this issue also is waived"). The invited error doctrine is, essentially, a form of estoppel. 5 C.J.S. *Appeal and Error* § 895 (2021) (stating that the invited error doctrine is "grounded in estoppel"). Still, "[t]he general rule in Maryland is that one does not lose the benefit of objection to inadmissible testimony by cross-examining on the subject." *Peisner v. State*, 236 Md. 137, 144 (1964). As this Court has explained:

> When testimony has been admitted and an exception noted, counsel may deem it necessary to cross-examine the witness on the subject, and **if it is simply a cross-examination he ought not to be deprived of his exception**, provided the record shows he does not intend thereby to waive it, and that ought to be inferred when it is strictly cross-examination.

Halloran v. Montgomery Cty. Dep't of Pub. Works, 185 Md. App. 171, 199 (2009) (quoting *United Rys. & Elec. Co. v. Corbin*, 109 Md. 442, 455 (1909), emphasis added in *Halloran*).

Further:

> [T]here are some practical limits to what counsel must do, or refrain from doing, in order to preserve [an] objection. When a party makes a clear objection to specific evidence and that objection is plainly overruled, he is not required to play the ostrich and simply ignore the evidence, or its potential effect upon his case, for fear of losing his ground for appeal. He may cross examine (or, in this instance, re directly examine) the witness about the evidence, *Peisner v. State*, 236 Md. 137, 144 (1964), and make other reasonable efforts to show that the evidence, admitted over his objection, should nevertheless be discounted or disregarded by the trier of fact.

Baltimore v. Smulyan, 41 Md. App. 202, 219 (1979).

We are not aware of any Maryland cases expressly addressing the question of whether the invited error doctrine applies to comments made in an opening statement.[7] However, in *State v. Heath*, the Court of Appeals addressed a similar question under the closely related "opening the door" doctrine. 464 Md. 445, 459 (2019). "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.'" *Id.* (quoting *Clark v. State*, 332 Md. 77, 84-85 (1993)). "Put another way, 'opening the door' is simply a way of saying: 'my opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" *Id.* (quoting *Clark*, 332 Md. at 85 (quotation marks omitted)).

In *Heath*, the defendant was charged with murder and attempted murder after he got into a fight with two men outside of a bar, killing one of them. *Id.* at 450-51. At trial, in her opening statement, defense counsel told the jury that Mr. Heath's "goal and . . . purpose" in going to the bar had been to "do[] tattoos," because that was "one of his primary sources of income." *Id.* at 452. The State did not object to this comment. *Id.* Then, during the State's case-in-chief, the State sought to admit into evidence a statement Mr. Heath made to the police. *Id.* In that statement, Mr. Heath said that he went to the bar to sell "a bit of white"—i.e., cocaine—and that "[t]hat's all [he] wanted to do." *Id.* at 453. The State argued that defense counsel's comment during her opening statement "opened the door to Mr. Heath's 'true' purpose" for being at the bar, and defense counsel argued that she had

[7] In *United States v. Chavez*, the Tenth Circuit held that a defendant invited an error through comments in opening statements. 229 F.3d 946, 952-53 (10th Cir. 2000).

not opened the door because opening statements are not evidence. *Id.* The court ultimately allowed Mr. Heath's statement to police to be admitted into evidence, ruling that defense counsel had opened the door in her opening statement. *Id.* at 454.

On appeal from Mr. Heath's convictions for involuntary manslaughter and second-degree assault, the Court of Appeals considered whether the trial court erred by ruling that the opening the door doctrine could apply to comments made in opening statements. *Id.* at 455. The Court acknowledged that "opening statements are not evidence," and explained that the purpose of an opening statement is to "provide[] the fact-finder with an outline of the case, the evidence that is to be presented, and the arguments that are to be made." *Id.* at 460 (quoting *Ford v. State*, 462 Md. 3, 32-33 (2018)). Despite this, the Court held that "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." *Id.* at 460-61; *see also Martin v. State*, 364 Md. 692, 707-08 (2001) (holding that the "general principles" of the opening the door doctrine are applicable to opening statements). However, because "Mr. Heath's intent to sell 'white'" was "immaterial to the issues in the case," the trial court had "exceeded the limitations of the opening the door doctrine" by allowing the State to introduce evidence of that intent. *Heath*, 464 Md. at 462-63. The Court held that the evidence of Mr. Heath's intent to sell cocaine was inadmissible because it was disproportionate to the comment made in opening statements—i.e., it was too prejudicial to be justified as a response to that comment. *Id.* at 463.

Returning to the present case, we must reject the State's argument that Mr. Shelton invited error through his counsel's cross-examination of Detective Moran. The fact that

D.P. gave two conflicting accounts of what happened, and Detective Moran's assessment of whether each account was truthful, had already been raised in the State's direct examination of Detective Moran. Additionally, defense counsel objected to the testimony at that time. Accordingly, because the issue was first raised by the State over his objection, Mr. Shelton did not waive his objection when defense counsel asked follow-up questions on cross-examination. *Peisner*, 236 Md. at 144; *Halloran*, 185 Md. App. at 199.

We reach a different conclusion, however, about the comments that defense counsel made in his opening statement. In his opening statement, the theory of the case that defense counsel suggested to the jury was that D.P. first fabricated a story of R.P. being killed by three unidentified men, and then, under pressure from police officers who disbelieved that account, she fabricated a second story of R.P. being killed by Mr. Shelton—both, in defense counsel's view, in an attempt to cover up her own fault in R.P.'s death. In making these arguments, defense counsel expressed an intent to introduce evidence of D.P.'s two conflicting stories as evidence of Mr. Shelton's innocence. *See Heath*, 464 Md. at 460 (quoting *Ford*, 462 Md. at 32-33) (stating that the purpose of an opening statement is to "provide[] the fact-finder with an outline of the case, the evidence that is to be presented, and the arguments that are to be made").

Because defense counsel expressed an intent to introduce evidence of the *content* of D.P.'s two conflicting accounts and of Detective Moran's disbelief of the first account—and suggested that this would be a significant part of Mr. Shelton's defense—it was entirely reasonable for the State to elicit testimony from Detective Moran in its case-in-chief that briefly referenced the circumstances under which D.P. provided the two different accounts

and the fact that Detective Moran believed one over the other.[8] Accordingly, we hold that Mr. Shelton is estopped from asserting that the circuit court erred by admitting Detective Moran's testimony because the error, if there was any, was invited by Mr. Shelton in his opening statement.

II.

The Basis for the Opinion

A. Parties' Contentions

Mr. Shelton also asserts that once the circuit court "allowe[ed] Detective Moran to testify that D.P.'s first account was not 'adding up' and that he did not believe the first account," the court erred in not permitting defense counsel to ask Detective Moran what D.P. had told him in her first account—i.e., the basis for Detective Moran's opinion that the first account was not truthful. Relying on *Derricott v. State*, 327 Md. 582, 591 (1992), he contends that "an officer may be cross-examined 'concerning the factual basis upon which he or she bases the conclusion, and the opinion will be given no more weight than the foundation upon which it rests.'" Mr. Shelton also makes a passing reference to his right, under the Confrontation Clause of the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, to confront the witnesses against him.

[8] For the same reasons, this case does not present the proportionality problem that was present in *Heath*. In *Heath*, the State's response was disproportionate because it introduced evidence that was both irrelevant and far more prejudicial than the defense counsel's opening statement. *Id.* at 462-63. But here, the State's response was, if anything, more restrained than defense counsel's opening statement.

The State responds that the court acted within its discretion by limiting the cross-examination because the detective's response would have been inadmissible hearsay. The State contends that defense counsel was asking Detective Moran to "testify to the contents of D.P.'s original statement to police exculpating [Mr.] Shelton" for the purpose of proving that exculpatory account to be true, making it hearsay. The State also asserts that any error was harmless considering that D.P. testified after Detective Moran and defense counsel cross-examined her about her version of events.

In reply, Mr. Shelton argues that the testimony Detective Moran would have given would not have been hearsay because "defense counsel was not seeking to prove the truth of that first statement." In Mr. Shelton's view, "[d]efense counsel only sought to uncover, and possibly discredit, the basis for Detective Moran's opinion" that "D.P. was truthful in her second statement to him and untruthful in her first."[9]

B. Analysis

"The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides, in pertinent part, that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Langley v. State*, 421 Md. 560, 567 (2011) (quoting U.S. Const. amend. VI.). The right of confrontation includes a criminal defendant's opportunity to

[9] Mr. Shelton also cites to Maryland Rule 5-703(d), which states that "[t]his Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert's opinion or inference." This rule plays no role in our analysis because it is expressly addressed toward *expert* opinions, and Mr. Shelton does not dispute that Detective Moran testified as a lay witness.

"cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely." *Martin v. State*, 364 Md. 692, 698 (2001) (quoting *Marshall v. State*, 346 Md. 186, 192 (1997)). A criminal defendant's constitutional right to cross-examination, however, is not boundless. *Pantazes v. State*, 376 Md. 661, 680 (2003). Trial judges have "wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant." *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

Under the Maryland Rules, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). "[A] circuit court has no discretion to admit hearsay in the absence of an exception to Rule 5-802," and therefore, we review without deference "whether evidence is hearsay and . . . whether it falls within an exception and is therefore admissible." *Hallowell v. State*, 235 Md. App. 484, 522 (2018).

"In any hearsay analysis, the first step is to identify what the extrajudicial statement was offered to prove." *Devincentz v. State*, 460 Md. 518, 553 (2018); *see* Murphy, *Maryland Evidence Handbook* § 702, at 305 (4th ed. 2010) ("When an out-of-court statement is offered in evidence, the trial judge must first determine why it is being offered").

As previously set forth, the challenged colloquy was as follows:

[DEFENSE COUNSEL]: That when you first got to the hospital you spoke with another officer who gave you a version of events that [D.P.] had given him -- or her, I'm sorry.

[DET. MORAN]: She was actually talking to the officer as I was standing there so I was kind of listening in.

[DEFENSE COUNSEL]: Okay. And that version of events you did not believe?

[DET. MORAN]: No.

[DEFENSE COUNSEL]: It was your opinion that what she was saying at that time was not truthful?

[DET. MORAN]: Correct.

[DEFENSE COUNSEL]: And what she was saying at the time was –

[THE STATE]: Objection.

THE COURT: Sustained.

Mr. Shelton contends that D.P.'s first statement was being offered to "uncover, and possibly discredit, the basis for Detective Moran's opinion" that "D.P. was truthful in her second statement to him and untruthful in her first." Taken alone, this contention suggests that the statement was offered as hearsay: if the statement was being offered to discredit Detective Moran's opinion the statement was untruthful, then that would necessarily mean offering the statement to prove its truth. That is the definition of hearsay. Md. Rule 5-801(c).

However, this characterization of Mr. Shelton's trial strategy by his appellate counsel is not consistent with statements by his trial counsel. Defense counsel's opening statement expressed a clear theory of the case: that D.P. was responsible for R.P.'s death,

and therefore that *both* of D.P.'s statements were false. Under that theory of the case, introducing D.P.'s first statement would still be useful for discrediting Detective Moran's opinion that the second statement was truthful, because if the first statement was untrue, then that harms D.P.'s credibility. In that case, D.P.'s first statement would not be introduced to prove its truth, making it not hearsay.

Because it is ambiguous whether D.P.'s first statement was meant to be introduced for a valid nonhearsay purpose, we do not decide whether the statement was admissible. Instead, we conclude that even if the court erred by ruling that the statement was inadmissible, the error was harmless. The precise information that defense counsel sought to elicit from Detective Moran was later testified to by D.P., who was subject to cross-examination by defense counsel. Because the jury was ultimately made aware of D.P.'s out of court statements, and defense counsel had the opportunity to cross-examine her about them, we are persuaded that the limits on Detective Moran's testimony about the same subject were harmless beyond a reasonable doubt.

III.

Merger

Finally, Mr. Shelton asserts that his sentence for second degree assault and reckless endangerment of D.P. merge. The State agrees, as do we.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects "against multiple punishments for the same conduct, unless the legislature clearly intended to impose multiple punishments." *Morris v. State*, 192 Md. App. 1, 39 (2010) (citation and quotation marks omitted). "Offenses merge and separate

sentences are prohibited when . . . a defendant is convicted of two offenses based on the same act or acts and one offense is a lesser-included offense of the other." *Khalifa v State*, 382 Md. 400, 432 (2004) (citation omitted).

"Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll v. State*, 428 Md. 679, 693-94 (2012) (quoting *Monoker v. State*, 321 Md. 214, 222 23 (1990)). The required evidence test, which "applies to both statutory and common law offenses," "focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Marlin v. State*, 192 Md. App. 134, 140 (2010). In the case of the rule of lenity, merger is required to reach a fair result when the court cannot decipher legislative intent as to whether separate sentences are permitted. *See Oglesby v. State*, 441 Md. 673, 681 (2015). "In both cases, whether the convictions are to be merged poses a question of law that we review without deference to [] the sentencing court[.]" *Clark v. State*, 473 Md. 607, 251 A.3d 1144, 1149 (2021).

Second-degree assault, defined by Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR") § 3-203, encompasses "three types of common law assault: '(1) intent to frighten, (2) attempted battery, and (3) battery.'" *State v. Frazier*, 469 Md. 627, 644 (2020). Most relevant here is the battery type of assault because the allegations against Mr. Shelton related to the actual physical harm caused to R.P. The battery type of assault requires the State to prove that "(1) the defendant caused offensive physical contact

with, or harm to, the victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified." *Nicolas v. State*, 426 Md. 385, 403-04 (2012).

Reckless endangerment requires the State to prove that the defendant "(1) engage[d] in conduct that create[d] a substantial risk of death or serious physical injury to another; or (2) discharge[d] a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another." CR § 3-204(a).

Under the required evidence test, reckless endangerment and battery-type second-degree assault do not merge because each requires an element that the other does not. Reckless endangerment requires a "substantial risk of death or serious physical injury to another," while second-degree assault does not; and battery-type second-degree assault requires actual physical contact, while reckless endangerment does not. *Cf. Koushall v. State*, ___ Md. ___, 2022 WL 324824 at *15, slip op. at 30-31 (Feb. 3, 2022) (holding that second-degree assault does not merge with misconduct in office under the required evidence test); *Marlin v. State*, 192 Md. App. 134, 165-67 (2010) (holding that reckless endangerment and first-degree assault do not merge under the required evidence test)

In *Marlin v. State*, we considered whether a conviction for reckless endangerment merged with a conviction for first-degree assault. 192 Md. App. 134, 140 (2010). We held that under either the rule of lenity or principles of fundamental fairness, reckless endangerment may merge with first-degree assault where the modality for first-degree assault was serious bodily injury to another (as opposed to use of a firearm) and the two crimes arise out of the same act. *Id.* at 165 (recognizing that reckless endangerment may

merge with first degree assault, of the serious bodily injury modality, "when the mens rea and the actus reus of reckless endangerment ripen into the specific intent to cause or attempt to cause serious physical injury"); *see also Manokey v. Waters*, 390 F.3d 767, 771 (4th Cir. 2004) ("[W]hen a single act is sufficient to result in convictions for both [reckless endangerment and first-degree assault under Maryland law], but the victim suffered only a single harm as a result of that act, then as a matter of fundamental fairness there should be only one punishment because in a real-world sense there was only one crime.").

Here, the indictment charged Mr. Shelton with second degree assault and reckless endangerment but did not identify which specific acts each charge related to. The court's instructions also did not inform the jury that the charges were based on separate acts. Further, although the State argued there were numerous assaults during the time in question, it did not distinguish between the charges of second-degree assault and reckless endangerment during closing argument. We conclude that the sentences merge and shall vacate the sentence for reckless endangerment. *See Marlin*, 192 Md. App. at 168 ("Under [the rule of lenity], if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge." (internal citation omitted)); *see also Alexis v. State*, 437 Md. 457, 486 (2014) ("The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State.") (citation omitted).

SENTENCE FOR RECKLESS ENDANGERMENT OF D.P. VACATED; JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE

AFFIRMED. COSTS TO BE PAID BY APPELLANT.