Circuit Court for Saint Mary's County
Case No. C-18-CR-22-000283

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 808

September Term, 2023

BRIAN S. SPICUZZA

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Zic,

JJ.

Opinion by Nazarian, J.

Filed: March 12, 2025

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

After trial and conviction in the Circuit Court for St. Mary's County on charges of sexual abuse of a minor, rape in the second degree, and sexual offense in the third degree, Brian Spicuzza argues on appeal that the court admitted inadmissible propensity evidence, excluded permissible propensity evidence, and allowed the State erroneously to ask Mr. Spicuzza to opine on another witness's veracity. We disagree and affirm the convictions.

I. BACKGROUND

On February 22, 2022, Detective Corporal James Bare of the St. Mary's County Sheriff's Office learned that two victims of reported sexual assaults, both minors, were on their way to a Child Advocacy Center ("CAC"). He went to the CAC where he watched on a television in a separate room as a social worker, Nicole Moneymaker, interviewed the two young women, I.H. ("I.") and A.L. The interview revealed two other potential victims, C.V. ("C.") and H.S. ("H."). Detective Bare then contacted H.'s mother, who brought her to the CAC. Ms. Moneymaker interviewed H., but H. had difficulty engaging and didn't disclose anything. She also denied that her father, Mr. Spicuzza, had done anything improper with her.

On February 23, 2022, Detective Bare sought and executed search warrants for Mr. Spicuzza's apartment and his person based on I.'s and A.L.'s interviews. Officers arrested Mr. Spicuzza the next day. On the day of his arrest, Ms. Moneymaker interviewed H. again, and this time she described being abused by Mr. Spicuzza. Ms. Moneymaker interviewed H. again on May 13, 2022, and in that interview, she revealed for the first time that her father had raped her.

Mr. Spicuzza was indicted for four counts of second-degree rape, one count of third-degree sexual offense, and five counts of sexual abuse of a minor. Before trial, Mr. Spicuzza and the State filed preliminary motions that raised some of the contentions he now asserts on appeal.

A. Pre-Trial Disputes

1. Character witnesses.

On September 27, 2022, the State moved to strike Mr. Spicuzza's character witnesses. Mr. Spicuzza opposed the motion, arguing that the witnesses would opine on his character for honesty, peacefulness, and appropriate interactions with children. The circuit court held a hearing on October 6, 2022, during which Mr. Spicuzza argued that his witnesses should be able to testify to an additional trait—his law-abiding nature. The State countered that the witnesses lacked an adequate basis to opine on Mr. Spicuzza's character but reserved further argument until Mr. Spicuzza submitted proffers for each witness. Mr. Spicuzza informed the court that he intended to submit proffers that would describe the witnesses' bases of knowledge, the relevant time frame, the frequency of their contact with Mr. Spicuzza, and the quality of those contacts. The court asked for the proffers in writing and the parties agreed to a second hearing on the character witness issue.

The second hearing took place on December 16, 2022. At that hearing, Mr. Spicuzza argued for only two traits—honesty and peacefulness—and withdrew appropriateness with children and his law-abiding nature. He argued that his honesty was relevant because he planned to testify at trial. He added that his proffers detailed each witness's testimony and

that each witness was qualified to testify. The State responded that the testimony proffered wasn't relevant to his charges and lacked specificity and that each witness's proffer was identical and conclusory. Mr. Spicuzza replied that each witness had spent enough time with him to form their proffered opinion. He walked through each witness's connection to him, although he acknowledged that information came from conversations between those witnesses and his attorneys.

After argument, the court concluded that because there were no allegations of force as part of the charges against Mr. Spicuzza, his character for peacefulness was irrelevant. As to honesty, the court found the proffers too conclusory, in that they didn't establish the basis for each witness to opine in the manner they proffered. The court also recognized that the proffers seemed geared to the traits Mr. Spicuzza had discarded, appropriateness with children and his law-abiding nature. Accordingly, the court found that the proffers lacked an adequate basis and granted the State's motion to preclude the proffered witnesses from testifying about Mr. Spicuzza's character for honesty.

2. "Other crimes" evidence.

As part of the December 16, 2022, hearing, the court also heard the parties' arguments on whether five of the State's witnesses—other young women who accused Mr. Spicuzza of sexual contact with them that wasn't being charged—would be permitted to testify. Mr. Spicuzza sought to exclude those witnesses, arguing that despite being other alleged victims, none of them witnessed firsthand his actions with H., the only alleged victim in this case. The State argued that the witnesses could testify under the common

scheme exception because as to H. and all the alleged victims, Mr. Spicuzza offered them drugs and alcohol to relax them so that they would acquiesce to his sexual advances. The State added that the common scheme exception applied here because part of Mr. Spicuzza's second-degree rape charges included raping a physically helpless individual.

The court ruled in the State's favor. It reasoned that their proffered testimonies fit within the common scheme exception because the victims were similar in age and made similar allegations. The court also found that the prejudice from this testimony would not be undue and denied Mr. Spicuzza's motion to exclude the witnesses.

B. Trial

At the outset of the trial, Mr. Spicuzza moved to reconsider the court's exclusion of his character witnesses. He also indicated that he intended to renew his motion at the start of the defense's case. The court reserved ruling on his motion until then.

The State called seven witnesses in its principal case. These included A.L. and A.B., two alleged victims. Early into A.L.'s direct examination, Mr. Spicuzza argued again that the common scheme exception shouldn't apply here, citing the "other crimes" evidence hearing. The court noted the objection and A.L. continued to testify. Later, when A.B. testified, Mr. Spicuzza again requested a continuing objection based on the "other crimes" evidence motion. The court noted the objection and permitted A.B. to continue testifying.

Mr. Spicuzza testified in his defense. After testifying, he moved for reconsideration, asking the court to permit his character witnesses to testify, this time only about his character for honesty, because the State had impeached him when he testified. The State

countered that Mr. Spicuzza's honesty was not impugned and reiterated that the proffers were conclusory and lacked a sufficient basis to form opinions on his honesty. The court reiterated its previous ruling that the proffers had been aimed at the previously discarded traits and lacked a foundation for opining as to his honesty, then denied the motion.

At the close of his case, Mr. Spicuzza moved again to have these witnesses introduced, adopting "all the same arguments with respect to character for honesty and rely[ing] on the written pleadings." The State relied on its previous arguments. The court reiterated that the proffers lacked a specific basis to support the witnesses' ability to opine on Mr. Spicuzza's honesty and denied the motion.

C. Sentencing

The case was submitted to the jury, which returned a guilty verdict on all counts. The court sentenced Mr. Spicuzza to twenty-five years, with credit for 476 days, for count 1; twenty years running consecutively to count 1, ten of those suspended, for count 2; twenty years running consecutively to counts 1 and 2, ten of those suspended, for count 3; twenty years running consecutively to counts 1, 2, and 3, ten of those suspended, for count 4; twenty years running consecutively to counts 1, 2, 3, and 4, ten of those suspended, for count 5; and ten years running consecutively to counts 1, 2, 3, 4, and 5 for count 6. Once released, Mr. Spicuzza will be on five years of supervised probation.

Mr. Spicuzza filed a timely notice of appeal. We supplement the facts as pertinent below.

II. DISCUSSION

Mr. Spicuzza presents three questions for our review, which we restate as follows: (1) was it error for the circuit court to allow other witnesses to testify under an exception to the prohibition against propensity evidence; (2) was it error for the circuit court to rule that Mr. Spicuzza's proffered potential witness testimony lacked adequate bases; and (3) was it error to allow the State to ask Mr. Spicuzza, "So why is your daughter lying?"[1] We shall affirm the trial court's rulings on each question.

[1] Mr. Spicuzza stated the Questions Presented in his brief as:

1. Whether the trial court erred when ruling other victims' accusations admissible "common scheme" evidence under Maryland Rule 5-404(b).
2. Whether the trial court erred by disallowing Mr. Spicuzza's character defense under Maryland Rule 5-608.
3. Whether the trial court erred in violation of *Horton* by allowing the State to ask Mr. Spicuzza on cross-examination, "So why is [the victim] lying?"

The State phrased the Questions Presented as:

1. To the extent not waived, did the trial court properly admit evidence of Spicuzza's other crimes?
2. Did the trial court properly conclude that Spicuzza's proffer did not suffice to allow his character witnesses to testify about his honesty?
3. To the extent not waived, where Spicuzza testified on direct that H.S. was lying, did the trial court properly allow the State to cross-examine Spicuzza regarding what motive, if any, H.S. had to lie?

A. The Other Alleged Victims' Testimony Was Admissible.

Mr. Spicuzza argues that the trial court erred by permitting propensity evidence, specifically when it allowed A.L. and A.B. to testify and allowed the State's witnesses to mention I. The State disagrees, arguing that those witnesses' testimony evinced a common scheme that qualified as an exception to the rule against propensity evidence. The State contends as well that the witnesses' testimony was permissible under the single transaction theory.[2] We agree that the evidence was admissible.

Admitting evidence of someone's prior bad acts to prove their propensity to do it again "may tend to confuse the jurors or prejudice their minds against the accused and to predispose them to a belief in his guilt." *Ross v. State*, 276 Md. 664, 669 (1976). But under Maryland Rule 5-404, prior bad acts evidence may be admitted if offered for purposes other than propensity:

> Evidence of other crimes, wrongs, or other acts, including delinquent acts as defined in Code, Courts Article § 3-8A-01, is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence,

[2] In light of our holding that these witnesses' testimonies were specially relevant, we need not discuss the single transaction theory. In addition, we disagree with the State that Mr. Spicuzza failed to preserve his objection to the prior bad acts evidence. The State argues that when reviewing the continuing objection Mr. Spicuzza made referencing any "testimony that was subject to the 404(b) hearing with respect to sex," we must hold Mr. Spicuzza to the "with respect to sex" grounds and should disregard anything beyond that, essentially waiving everything else he argued in the pre-trial Rule 5-404 hearing. At that hearing, though, the trial court heard arguments on this very issue—his motion to exclude the "other crimes evidence." Mr. Spicuzza lost. At trial, he moved again to have that testimony excluded. His objections based on Md. Rule 5-404(b) called back to that pre-trial hearing and preserved his argument for review.

> however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

Md. Rule 5-404(b). The enumerated list of exceptions within the Rule is not exhaustive but provides examples of how this evidence may be introduced under appropriate circumstances. *Merzbacher v. State*, 346 Md. 391, 407 (1997) (*quoting Harris v. State*, 324 Md. 490, 501 (1991)).

When reviewing a decision to admit prior bad acts evidence, we apply a three-part test: (1) the evidence must fall within one of the exceptions or otherwise be specially relevant, which we review *de novo*; (2) the accused's participation in the "bad acts" must be established by clear and convincing evidence, which we review under the sufficiency of the evidence standard; and (3) the necessity for and probative value of the evidence must be weighed carefully against any undue prejudice, which we review for an abuse of discretion. *State v. Faulkner*, 314 Md. 630, 634–35 (1989). The contention here concerns a common scheme, so we begin with that analysis.

1. The evidence was specially relevant.

Prior bad acts evidence that is specially relevant to some contested issue in the case can be admitted, *Faulkner*, 314 Md. at 634, but not if the primary inference to be drawn from the evidence is propensity. *Browne v. State*, 486 Md. 169, 191 (2023). A court assessing this evidence must determine that the proffered contested issue is genuine and the prior bad acts evidence is "substantially relevant" to that issue. *Id.* at 192. Maryland

Rule 5-404(b) provides examples of instances when the proffered evidence has special relevance, and one of those is a common scheme.

a. The evidence here did not establish a common scheme.

To qualify as a common scheme, "it is necessary that the crimes, including the crime charged, so relate to each other that proof of one tends to establish the other." *Cross v. State*, 282 Md. 468, 475 (1978). This requires a "'causal relation or logical or natural connection among the various acts[,] or they must form part of a continuing transaction to fall within the exception.'" *Reidnauer v. State*, 133 Md. App. 311, 322 (2000). "A method of operation is not, by itself, a common scheme, but merely a repetitive pattern." *Cross*, 282 Md. at 475. And the inference drawn from the common scheme must be the existence of "a single inseparable plan encompassing both the charged and uncharged crimes, typically, but not exclusively, embracing uncharged crimes committed in order to effect the primary crime for which the accused has been indicted." *Id.*

A common scheme can be established in two ways: (1) by proving a *modus operandi*; or (2) as a plan to commit one offense as part of a grand scheme to commit others. *McKinney v. State*, 82 Md. App. 111, 124 (1990). This case doesn't raise a *modus operandi* issue. And to prove a grand scheme, we have said that, "in a separate prosecution of [the accused] for sexual contact with one child[,] *evidence of similar conduct with a different child* [] would not be relevant because it would not tend to prove that kind of common scheme." *Id.* (emphasis added). Additionally, if consent is at issue, evidence of a lack of consent as to one rape victim is not probative as to whether another rape victim

consented. *Reidnauer*, 133 Md. App. at 324.

In this case, the State argues that Mr. Spicuzza's common scheme took the form of using "H.S. to lure underage girls to [Mr. Spicuzza's] home and provide them with intoxicating substances. After they consumed those substances in the privacy of his home, [Mr.] Spicuzza sexually propositioned them and showed them pornography (including child pornography). Once H.S. was intoxicated, [Mr. Spicuzza] sexually abused her." We disagree that this is a common scheme—indeed, similarities or patterns alone do not establish a common scheme. *Cross*, 282 Md. at 475 ("The concurrence of common features under this exception, however, must be more than simply a manner of operation, which is possessed to some extent by most criminal recidivists."); *see Reidnauer*, 133 Md. App. 323 (no common scheme where two victims independently alleged that on separate occasions perpetrator picked up victims during morning hours, took them to perpetrator's workplace, forced victims out of their clothes, raped them using Vaseline, advised both victims that perpetrator had HIV and intended to infect them, and where those allegations occurred only a month apart).

To be sure, the "bad acts" alleged here were very similar. According to A.L., she went to Mr. Spicuzza's apartment every weekend for a period of time. When she first arrived, Mr. Spicuzza instructed her not to "film anything[,] . . . be on the phone or like take pictures of alcohol . . . [, or] talk to people about what goes on there." Mr. Spicuzza also allegedly made sexual comments toward A.L., that included comments about her body and sexual propositions in exchange for providing A.L. marijuana, alcohol, or vapes. He

also showed her pornography. Compare that to A.B.'s allegations—she testified that she too spent time at Mr. Spicuzza's apartment and that he also forbade her from filming or telling anyone about what occurred there. According to A.B., Mr. Spicuzza made sexual comments toward her, such as wanting to engage in coitus with her. He also provided marijuana, alcohol, and vapes and showed her pornography. Unlike A.B., however, A.L. testified that she woke up with Mr. Spicuzza attempting to "get his hands down [A.L.'s] pants and [she] was kind of like frozen."

H. testified to the same "bad acts" as A.L. and A.B. She attested to Mr. Spicuzza's secrecy demands while at his apartment, his sexual comments and propositions, his provision of drugs and alcohol, and how he showed her pornography. Like A.L., she testified that she woke up at times with Mr. Spicuzza's hand "going down [her] back towards [her] private parts." On the other hand, Mr. Spicuzza denied outright that these "bad acts" occurred, presenting a contested issue. When confronted with this contested issue of what actually happened, *McKinney* informs us that "in a separate prosecution of [the accused] for sexual contact with one child—*evidence of similar conduct with a different child*—would not be relevant because it would not tend to prove that kind of common scheme." 82 Md. App. at 124 (emphasis added). And because similarities alone are insufficient, A.L. and A.B.'s allegations were not relevant to prove the posited common scheme.

It also is not the case that the State needed A.L. and A.B.'s allegations to prove H.'s. After all, both witnesses were at Mr. Spicuzza's apartment at different times from each

other. So, for example, proving that Mr. Spicuzza provided A.L. or A.B. alcohol didn't make it more likely that he provided H. with alcohol. And even if the State had established a common scheme for the purpose of proving Mr. Spicuzza's proclivity for illicit sexual relations with H., his actions toward A.L. or A.B. aren't relevant. *McKinney*, 82 Md. App. at 122. This is especially true given that H.'s allegations date back to when Mr. Spicuzza lived with his parents, a time *before* A.L. and A.B. came into the picture. As a result, this was not common scheme evidence.

b. The evidence here completed H.'s narrative for the jury making it specially relevant.

The State also argues that A.L. and A.B.'s testimony helped to explain H.'s delay in reporting the abuse that she suffered. This contention is more persuasive.

Evidence of uncharged conduct "is not considered 'other crimes' evidence if it 'arose out of the same . . . series of transactions as the charged offense, . . . or if it is necessary to complete the story of the crime (on) trial.'" *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994) (citations omitted). This evidence can be relevant to explain why a victim delayed reporting abuse that the victim suffered or to prove that the victim didn't consent to the abuse. *See United States v. Powers*, 59 F.3d 1460, 1467 (4th Cir.1995) (evidence of father physically abusing family and threatening to burn family house down with children and mother inside held admissible to explain why daughter waited eighteen months to report sexual abuse); *see also Merzbacher*, 346 Md. at 404–11 (trial judge did not abuse discretion by admitting evidence of teacher physically and sexually abusing

students, drinking and providing alcohol to students, and using vile language against students and faculty because it was probative of intimidating climate that compelled student's submission to teacher's sexual abuse and their delayed reporting of the abuse).

This principle applies here. During H.'s cross-examination, Mr. Spicuzza impugned her credibility by contending that H. had not been forthcoming about everything she alleged:

> [BY DEFENSE COUNSEL]:
> Q. So the sexual intercourse that came into your memory days before May 13th was not that important to your story?
> A. It was, but I didn't feel like putting it in there. I would have to rewrite my whole story which I didn't have enough energy to do.
> Q. So when did you write your story?
> A. We started it about, I'm not exactly sure when I started it. But I finished it, I think, a month before I shared it with [my uncle] and the officer.
> Q. Right. And you wrote it in a Word document, right?
> A. Yes.
> Q. And you used Word documents for school to write things, right?
> A. I hadn't written it. I had had my therapist type it for me, but it was my words.
> Q. Right. But she emailed it to you in a Word document, right?
> A. I think so.
> Q. Right. So all you had to do was go in and put the cursor somewhere and write, "My father also had sexual intercourse with me," period, space. That's all you had to do, right? In the Word document.
> A. I guess so.

Q. But you didn't want to do that.

A. My story actually made like grammatical sense. If I had put that in there it wouldn't make grammatical sense.

* * *

Q. And then you describe another, you drew another diagram with Ms. Moneymaker in May of 2022 how your father as you say had sexual intercourse with you in some other position, correct?

A. Correct.

Q. And it took you a while to draw that on the board, right?

A. I'm not sure. I don't think so.

Q. Okay. And it was important for you then to give Ms. Moneymaker all that detail with the descriptions of how your father was standing and how you were lying in the bed and where the pillows were, correct?

A. Yes. Because it was important for me to give them as much detail as possible during my interview. My story is a different case. It's not for anybody else but me.

Q. Right. Well, it was for, I mean you're the one that chose to invite [your uncle] to hear you read your story, right?

A. Yeah.

Q. And you also knew that a detective from St. Mary's County was going to be there, right?

A. Yeah. I invited him.

Q. Right. And you knew that your therapist would be listening, right?

A. Yes.

Q. All right. And it wasn't important then to tell the detective and your therapist and your uncle about the sexual intercourse?

A. At that time, I'm pretty sure my story was finished.

Q. When you say your story was finished in relation to August of 2022, when you met with [your uncle] and the detective, did you mean -- what did you mean by

that?

A. I had finished my story, like I had stopped writing about it. I only wrote like a paragraph because it's hard to write about.

Q. Well, you said that your therapist wrote it for you, right?

A. Well, yeah. But it's hard to talk about in detail.

Q. Okay. But you just said it's hard to write it, to the jury. Right?

A. Yeah.

Q. So I'm just going to ask you to access your memory.

A. I'm sorry. I used the wrong word.

Q. Fair enough. I'm just going to ask you to access your memory. Did you write that or did your therapist write that statement that you read your story to [your uncle]?

A. I had had my therapist write the story for me.

Q. Right. And I think you told the jury that it was written by your therapist maybe a month or so before August of 2022?

A. Can you repeat that?

Q. I think you said earlier that the story that your therapist wrote was finished a month before you told [your uncle] the story.

A. Then I must have gotten the date wrong, or the time wrong. I'm sorry.

Q. Okay. So when did your therapist write the final version of your story?

A. Probably before I went in to talk to her.

Q. A couple days before, so when was that? A couple days before August?

A. I'm not sure. I don't know the exact date.

Q. All right. Well, didn't you review -- I mean this was a pretty big event for you to read this in front of your uncle, right?

A. Yeah.

Q. So you didn't you read your statement at least once before you read it to your uncle and a detective in August?

A. No. I read it over and made sure it was like fine, but like that's about it.

Q. And when you read it over to make sure it was fine, you recognized that it didn't include sexual intercourse, right?

A. We finished it before I went in to talk about the other thingy, the other interview. Sorry.

Q. So now you're saying you finished your story before you spoke to Ms. Moneymaker in May?

A. Sorry. That's what I was trying to say.

Q. Okay. So when you told Ms. Moneymaker then, something in addition to your story, meaning, "My dad had sexual intercourse with me" --

A. Mm-hmm.

Q. -- was that something that was actually in your memory?

A. Yeah.

Q. Okay. When did you finish it? How many days or weeks or months before you met with Ms. Moneymaker?

A. I'm bad with timestamps.

Q. Pardon?

A. I'm bad with timestamps. Again.

Q. All right. But it would be in your email, wouldn't it?

A. I don't know. No, the date would change because I had to pull it up on my email to read it.

Q. Right. So we would know when you pulled it up if you looked on your email, right?

A. I have no clue.

* * *

Q. [Mr. Spicuzza] told you what he did in his sexual relationship with his serious girlfriend Jamie Johnston?

A. Yes. He'd also liked to tell me what he did with my mother when they were married.

Q. You never told Ms. Moneymaker that fact, did you, that your father always told you what he did with your mother when you all (sic) were married, correct?

A. No. I have not.

Q. You never told Ms. Moneymaker that he would tell you what he would do with his serious girlfriend Jamie Johnston when they were together in private in his bedroom, did you?

A. No. I didn't find it important. I completely forgot about it until you mentioned something. My bad.

Q. Besides, going back to where we started, besides [I., C., A.L.], who else did you tell before you told your mother?

A. That's it.

Q. That's it?

A. Yes.

Q. All right. So your mother was the fourth person you told?

A. Yes.

Q. And you didn't tell her everything, did you?

A. What do you mean?

Q. Well, did you tell her everything, you know, the sexual intercourse?

A. When?

Q. When you first --

A. My mother knows everything now.

Q. Fair enough. When you first told your mother, okay, before this Checkers incident --

A. Yes.

Q. -- did you tell your mother about sexual intercourse?

A. No.

Q. Did you tell your mother about oral sex?

A. Yes.

Q. Okay. You told your mother before the Checkers incident in February about oral sex on both you and oral sex on him?

A. Yes. Yes, I did, actually, because she had asked me questions. I just forgot to mention it in my statements at the time.

Q. Well, you spoke to your mother before you spoke to Ms. Moneymaker.

A. Correct.

Q. Right. And I thought you told the jury both when I was asking you questions and when the prosecutor was asking you questions that you didn't tell Ms. Moneymaker about those things because you weren't comfortable, not because –

A. I wasn't --

Q. -- you forgot, correct?

A. Yeah. I wasn't comfortable with Ms. Moneymaker.

Q. So which one is it? You didn't tell her because you were not comfortable or you didn't tell her because you forgot?

A. Huh?

Q. When you first spoke to Ms. Moneymaker on February 22nd, did you leave -- did you deny all sexual abuse with your father –

A. The first time I did.

Q. Did you deny all sexual abuse because you forgot or because you were not comfortable?

A. What?

Q. Well, that's okay. I'll just say it again. When you first spoke to Ms. Moneymaker on February 22nd and said

nothing ever happened bad with my dad --

A. Yes.

Q. -- nothing ever happened bad with my dad and my friends, right? That's what you said.

A. Mm-hmm.

Q. Right. And you repeated it a couple times, right?

A. Yes.

Q. You said it would be disgusting.

A. Yes. Yes, I did and it is.

Q. When you said those things denying it with Ms. Moneymaker, is that because you forgot that it had happened or you didn't feel comfortable with her?

A. Neither. I was scared my dad was going to go to jail. He was my father.

Q. So you did remember them and chose not to say them.

A. Yes.

On redirect examination, H. clarified that therapy had helped her remember certain details that she had suppressed and helped her understand why she had not disclosed the sexual intercourse to Ms. Moneymaker initially:

Q. I understand. Can you explain to the jury in your own words why it is that you did not tell Nichole Moneymaker on the second interview about the vaginal sex and the toys?

A. At that time I had not remembered very clearly. I assumed he had done more stuff but I did not remember so I did not want to put it out there that he had done that without knowing for sure that he did. But with therapy and like talking about it had helped me like -- like sometimes when severe trauma happens I block out things in my brain and I assume I did that with that because I didn't want him to like look like the bad guy in my brain. So I had, had had [my therapist] help me

> like talk about it and I'm a lot more open with it now and which has even helped me even more to remember things.

The "bad acts" here were relevant to explain H.'s delay in revealing the abuse sooner. H. testified that she didn't want her father jailed for his alleged acts. A.B.'s testimony corroborated this reasoning. She revealed that H. had told her that she was terrified that her mother and stepfather would find out about "the things [Mr. Spicuzza] said to us, us smoking, vaping, drinking, et cetera." This tracked H.'s general description that her mother was strict and supported an inference that H.'s mother likely would report Mr. Spicuzza's alleged misbehaviors and increase the likelihood of H.'s fear manifesting—that is, that her father would be "taken away." Additionally, H. begged A.B. and the other girls not to reveal the alleged misconduct. Including A.B.'s testimony bolstered H.'s veracity in describing the lengths to which H. went to abate her fears. Thus, A.B.'s testimony made H. more credible without relying on Mr. Spicuzza's propensity.

Further, A.L.'s and A.B.'s testimony helped plug some of the gaps in H.'s memory. H. testified to struggling to remember a lot of details due, she said, to drug and alcohol consumption and suppressing memories. But since A.L. and A.B. were there, they could complete the narrative for the jury. That narrative included I., who also was there. Although A.L. and A.B. did not meet, H. was there each time either of them was at Mr. Spicuzza's apartment. When Mr. Spicuzza allegedly showed A.L. pornography, H. was present. Each time the girls consumed drugs and alcohol, H. was present. As a result, those girls could testify to facts that H. couldn't. H. testified only to her father procuring and providing

vodka to H. and her friends. But A.B. added that Mr. Spicuzza also provided them beer and nicotine vapes, a fact that H. did not identify. Similarly, A.L. added that when the girls declined to drink alcohol, Mr. Spicuzza would make the girls coffee with alcohol in it, another fact H. didn't reveal. By explaining further the environment that H. was in, the "bad acts" testimony pinpointed details, such as the type of alcohol and how Mr. Spicuzza provided it to the victims, that the jury could use to credit H.'s testimony about her memory gaps. This made the testimony specially relevant, and more importantly, admissible.

2. Mr. Spicuzza participated in the prior "bad acts."

The second requirement in the *Faulkner* test is that the accused's participation in the other "bad acts" be established by clear and convincing evidence. 314 Md. at 634. This is not in any serious dispute. A.L. and A.B. testified the alleged "bad acts" occurred in Mr. Spicuzza's apartment and added that I. was there. H. testified to the same. Each witness interacted with Mr. Spicuzza directly and observed what occurred in his apartment. And although Mr. Spicuzza denied altogether that these "bad acts" occurred, he admitted that all of these children were at his apartment. His participation in the acts in question was established by clear and convincing evidence.

3. The danger of undue prejudice does not substantially outweigh the "bad acts'" probative value.

Under the third prong, we weigh the necessity for and probative value of the "bad acts" against the danger of unfair prejudice from admitting them. *Faulkner*, 314 Md. at 635. Under Maryland Rule 5-403, if this danger outweighs the necessity for and probative

value of these "bad acts" substantially, the evidence must be excluded. *Id.* Again, we review this ruling for abuse of discretion. *Faulkner*, 314 Md. at 641.

The danger here is common to all "bad acts" evidence. This kind of evidence carries the taint of propensity that "is often too prejudicial and may interfere with a defendant's Sixth Amendment right to a fair trial." *Merzbacher*, 346 Md. at 407. More to the point, Maryland Rule 5-404(b) reflects the concern that a jury may punish a defendant solely because of his propensity to commit the charges before them. *Id.* at 406–07. Nevertheless, we cannot fault the circuit court's balancing in this case.[3]

[3] We emphasize here that we are reviewing the circuit court's weighing of the necessity for and probative value of A.L.'s and A.B.'s testimony, along with the mentions of I., against the undue prejudice to Mr. Spicuzza before the court admitted the evidence. *Faulkner*, 314 Md. at 635. In doing so, we recognize that the circuit court considered this evidence before admitting it, and our review focuses on whether the court abused its discretion by deciding to admit it. *See Streater v. State*, 352 Md. 800, 821 (1999) (distinguishing cases State cited there because trial courts in those cases assessed relevancy and potential prejudice of bad acts evidence before admitting it as evidence, whereas in that case, "reversible error occur[red] where significant evidence of other crimes was admitted without any apparent on-the-record consideration by the trial court."). Here, the State raised the means through which we reach our ultimate decision, that the "bad acts" evidence was admissible to contextualize H.'s delayed disclosure. *Merzbacher*, 346 Md. at 404–11. Whether offered for that purpose or for a common scheme the evidence would remain the same for either purpose, as would any dangers of undue prejudice. So although the State's theory was not before the circuit court, it was raised in the State's brief, the circuit court did conduct the required balancing test on the record, and, in our view, did not abuse its discretion. *Compare Robeson v. State*, 285 Md. 498, 502 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm.") *with N. River Ins. Co. v. Mayor & City Council of Balt.*, 343 Md. 34, 47–48 (1996)

Continued . . .

The danger of unfair prejudice here came from the possibility that the jury would convict Mr. Spicuzza based on the "bad acts," *i.e.*, because Mr. Spicuzza provided alcohol and drugs to minors and assaulted them sexually, he was a "bad actor" who deserved punishment for the crimes charged and uncharged. But the probative value of A.L.'s and A.B.'s testimonies outweighed the incidental prejudice to Mr. Spicuzza. These witnesses were at the apartment and observed firsthand what happened there, specifically what Mr. Spicuzza did, and helped complete the narrative of what took place. Along with those witnesses was their friend I., who also was present and observed everything. These witnesses were embedded in the setting where H.'s alleged abuse occurred, *Powers*, 59 F.3d at 1467, and their observations were linked in time and circumstances to the setting of the alleged abuse. *Id.* at 1466 (reiterating that "bad acts evidence explaining the context of the crime 'is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury'" (citation omitted)).

Although A.L. and A.B. may not have seen Mr. Spicuzza abuse H. with their own

(highlighting that when reviewing trial court's decision to impose discovery sanctions, appellate courts cannot exercise their own discretion "in the first instance" by searching "the record for grounds[] not relied upon by the trial court") *citing In re Adoption/Guardianship No. 10935 in Cir. Ct. for Montgomery Cnty.*, 342 Md. 615, 630–31 (1996) (recognizing circumstance where appellate Court made a "good cause" and "best interests of the child" determination in the first instance while also noting that such issues "should normally be resolved in the first instance by the trial court and not initially by an appellate court.").

eyes, their testimony unearthed important and corroborating details about the atmosphere in which the abuse occurred and explained H.'s heightened vulnerability. Their testimony also demonstrated Mr. Spicuzza's control over that environment and the children. It completed the picture and gave the jury the full context to evaluate H.'s testimony, memory gaps, and rationale for delaying disclosure. We agree with the circuit court that A.L. and A.B.'s testimony was admissible, including the various mentions of I.

B. Mr. Spicuzza's Proffers Regarding His Character Witnesses Were Inadequate.

Next, Mr. Spicuzza asserts that the trial court erred in barring his character witnesses from testifying. The State responds *first* that Mr. Spicuzza was not charged with an offense that would permit him to call character witnesses, and *second*, that even if there were such a charge, Mr. Spicuzza's proffer as to the potential witnesses' testimony was inadequate. We agree with the State.

"We review a trial court's decision to admit or exclude a character witness's opinion for abuse of discretion." *Devincentz v. State*, 460 Md. 518, 539 (2018). A trial court abuses its discretion when it adopts a view that no reasonable person would take. *Id.* Determining whether the court abused its discretion '"usually depends on the particular facts of the case and the context in which the discretion was exercised."' *Id.* at 540. (cleaned up) (citations omitted).

1. The proffered testimony was not relevant to the crimes charged.

To address this issue properly, we must differentiate between "honesty evidence"

bearing on Mr. Spicuzza's charged offenses and "honesty evidence" bearing on his credibility as a witness. At the December 16, 2022, hearing, the trial court granted the State's motion to exclude Mr. Spicuzza's character witnesses after finding honesty irrelevant to his charges. Mr. Spicuzza argued that this decision was erroneous because it was rooted in "specious grounds[.]" For our purposes, this is the proper analytical starting point before getting to the later denials of Mr. Spicuzza's motions to reconsider, which occurred during the trial and concerned his credibility as a witness.

Generally, "[a]n accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." Md. Rule 5-404(a)(2)(A). When the State objects to a defendant's proffer of opinion or reputation evidence about that defendant's character under Rule 5-404(a)(2)(A), the court must make three determinations: (1) whether the Rule encompasses the purported trait; (2) whether the purported trait is relevant to the charged offenses; and (3) if the answers to the first two questions are affirmative, then the court, if requested by the State, tests whether the evidence's probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . undue delay, waste of time, or needless presentation of cumulative evidence." *Vigna v. State*, 470 Md. 418, 449 (2020); Md. Rule 5-403.

With regard to whether Maryland Rule 5-404 encompasses the character trait of honesty, Mr. Spicuzza must identify with particularity how honesty sheds light on "the kind of person [he] is." *Vigna*, 470 Md. at 450. This is not a difficult hurdle to overcome.

Id. As long as the character trait—here, honesty—is "sufficiently specific to distinguish it from 'good character generally,' [Mr. Spicuzza] will pass this first part of the test." *Id.* at 450–51. And he does. Courts long have recognized honesty or truthfulness as a character trait encompassed in Rule 5-404. *See Sahin v. State*, 337 Md. 304, 311–13 (1995) (assessing whether truthfulness is relevant to the crime of drug distribution); *see also Grant v. State*, 55 Md. App. 1, 39 (1983) (holding that while a "reputation for truth and veracity would be relevant upon the trial of a charge such as perjury, false pretenses, or embezzlement, it has no bearing on the likelihood to commit an offense involving narcotic drugs").

In assessing whether the purported trait is relevant to the crimes charged, a court should consider whether the proffered evidence, if believed, makes it less likely that the defendant committed the charged offense. *Vigna*, 470 Md. at 451. Similarly, "'it is necessary that the character be confined to an attribute or trait the existence or nonexistence of which would be involved in the noncommission or commission of the particular crime charged.'" *Sahin*, 337 Md. at 311 (citation omitted) (cleaned up). Truthfulness may be relevant where the crime is a *crimen falsi*—one involving untruthfulness.[4] *Id.* at 312. But the charged offenses here were sexual abuse of a minor, second-degree rape, and

[4] These include "crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense involving some element of deceitfulness, untruthfulness, or falsification bearing on witness' propensity to testify truthfully.'" *Sahin*, 337 Md. at 312 (citations omitted).

third-degree sexual offenses. Those aren't truthfulness crimes.

As to offense one, sexual abuse of a minor, the statute prohibits a "parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor [from causing] sexual abuse to the minor." Md. Code (2002, 2021 Repl. Vol.), § 3-602 (b)(1) of the Criminal Law I Article. In *Vigna*, our Supreme Court held that where the State alleges that a defendant sexually abused a child in the defendant's care, character evidence as to that defendant's appropriateness with children entrusted to them is relevant. 470 Md. at 452. Contrast that with Mr. Spicuzza, who was in the care of the young children and was charged with sexually abusing a minor in his custody. Although his appropriateness with children might have been relevant, his character for honesty says nothing about whether he abused H. Said differently, believing Mr. Spicuzza was an honest individual would not have made it less likely that he sexually abused H.

As to offense two, the State charged Mr. Spicuzza under two of the second-degree rape statute modalities. These prohibit: [1] engaging "in vaginal intercourse or a sexual act with another . . . if the victim is . . . a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is . . . a physically helpless individual;" and [2] engaging "in vaginal intercourse or a sexual act with another . . . if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim." Md. Code (2002, 2021 Repl. Vol.), §§ 3-304(a)(2), (3) of the Criminal Law I Article. We hold that the character trait of honesty isn't relevant to either modality.

Under the first modality, honesty would not make it less likely that Mr. Spicuzza committed the prohibited offense. The answer might be different if, for example, Mr. Spicuzza lodged a mistake-of-fact defense—if Mr. Spicuzza honestly and reasonably did not know H. was physically helpless, honesty testimony may have been relevant to negate his *mens rea*. *See Outmezguine v. State*, 335 Md. 20, 52 (1994) ("'The mistaken belief must tend to negate the *mens rea* necessary to the commission of the crime.'" (citations omitted)). But Mr. Spicuzza didn't raise a mistake-of-fact defense; indeed, he outright denied the second-degree rape allegations. And because we see no other probative potential, honesty testimony would have been irrelevant.

The second modality is Maryland's statutory rape statute, a strict liability offense. *Garnett v. State*, 332 Md. 571, 584–87 (1993) (discussing the statute's predecessor and legislative history). The Maryland Supreme Court has recognized that a defendant's character trait of "truth and veracity, or peace and quietude"' is not relevant in a prosecution for statutory rape. *Sahin*, 337 Md. at 311 (citations omitted).

Offense three was third-degree sexual offense, which criminalizes engaging "in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim." Md. Code (2002, 2021 Repl. Vol.), § 3-307(a)(3) of the Criminal Law I Article. Again, we cannot see how honesty would bear on Mr. Spicuzza's propensity to commit this offense. True, the alleged acts occurred in his home, and he allegedly prohibited the children from divulging the acts to others outside the home, and thus committed the acts in secrecy. Maryland recognizes

that truthfulness may be relevant in connection with acts such as narcotics trafficking, which traffickers carry out in secrecy. *State v. Giddens*, 335 Md. 205, 217 (1994). But truthfulness has little probative value, if any, with regard to whether a person would commit a third-degree sexual offense involving a young person.

2. Mr. Spicuzza's character for truthfulness was not relevant.

Having held that testimony about Mr. Spicuzza's character for honesty wasn't relevant to the charged offenses, we turn next to whether that testimony was admissible with regard to his credibility as a witness. Under Md. Rule 5-404(a)(3), evidence "of the character of a witness with regard to credibility may be admitted under Rules 5-607, *5-608*, 5-609." (emphasis added). Under Rule 5-608, "[a]fter the character for truthfulness of a witness has been attacked, a character witness may testify (A) that the witness has a good reputation for truthfulness or (B) that, in the character witness's opinion, the witness is a truthful person." Md. Rule 5-608(a)(2). At the same time, "Maryland Rule 5-608 must be read in light of Courts & Judicial Proceedings § 9-115 . . . . " *Jensen v. State*, 355 Md. 692, 700 (1999). That statute provides that "[w]here character evidence is otherwise relevant to the proceeding, no person offered as a character witness who has an adequate basis for forming an opinion as to another person's character shall hereafter be excluded from giving evidence based on personal opinion to prove character . . . ." Md. Code (1974, 2020 Repl. Vol.), § 9-115 of the Courts and Judicial Proceedings II Article. Within this statute are two prongs: (1) the relevance of the character opinion; and (2) an adequate basis for it.

a. The State did not attack Mr. Spicuzza's general character for honesty.

Relevance turns on whether the witness's character for truthfulness has been attacked. One way this occurs is when a defendant is charged with a veracity-impeaching offense. These include "those crimes which are so relevant to credibility that convictions of the crime may be used to attack the credibility of a witness," such as impeachable crimes under Md. Rule 5-609. *Sahin*, 337 Md. at 307 n.1. When a defendant "charged with a crime which would be an impeachable offense elects to testify, the State's evidence that the defendant committed the impeachable offense constitutes an attack sufficient to allow the defendant to present character evidence of his or her good character for truthfulness." *Id.* at 314. But if there is no way to determine from the name or nature of the offense whether it is relevant to assessing a defendant's credibility, then it is not one for which a conviction would be admissible for impeachment. *Ricketts v. State*, 291 Md. 701, 710–11 (1981).

Typically, the defendant must testify to bring his character for truthfulness into question. *Sippio v. State*, 350 Md. 633, 664 (1998). "Absent this testimony, a defendant's character for truthfulness is not relevant because that defendant has not placed his or her veracity in question." *Id.* Criminal defendants, however, are not bound to testify in their own defense. *See* U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."). Our Supreme Court imagined a distinct occasion where a criminal defendant might proffer an intent to testify to the court, obtain permission from the court to vary the order of proof, and put on character witnesses attesting to their

honesty *before* first testifying. 350 Md. at 664.

In this case, Mr. Spicuzza had not yet testified at the time of the December 16, 2022 ruling. And given our holding that the proffered character testimony was not relevant to Mr. Spicuzza's charges (*see* Section B.1 of this opinion), the question that remains is whether the *Sippio* exception applies. *Id.* The trait here is honesty or character for truthfulness. The charged offenses were sexual abuse of a minor, second-degree rape, and third-degree sexual offense. Could a witness who was previously convicted of these charges have their credibility impeached with evidence of those convictions? *Sahin*, 337 Md. at 308 n.1.

No, they can't. Sexual abuse of a minor is not a veracity-impeaching offense. In general, crimes admissible to impeach credibility are infamous crimes, such as treason, common law felonies, and *crimen falsi* crimes, or morally turpitudinous crimes. *Carter v. State*, 80 Md. App. 686, 692 (1989). These are all per se admissible. *Id.* Non-infamous misdemeanors and statutory felonies, on the other hand, are lesser crimes that may or may not bear on a witness's tendency to be truthful. *Id.* Sexual abuse of a child is a statutory felony in Maryland. *Hopkins v. State*, 137 Md. App. 200, 206 (2001); Md. Code (2002, 2021 Repl. Vol.), § 3-602(c) of the Criminal Law I Article. Under that statute, sexual abuse is a form of child abuse. *See Cooksey v. State*, 359 Md. 1, 23 (2000) (discussing statute's predecessor). Convictions under the predecessor child abuse statute are irrelevant to a person's veracity, *Hopkins*, 137 Md. at 206, so sexual abuse of a minor is not a veracity-impeaching offense.

Second-degree rape also is not a veracity-impeaching offense. The Maryland Supreme Court has cautioned impeaching a witness with that witness's prior rape conviction because "[r]ape in any degree without further explanation commonly would be perceived as a vicious, violent, brutal sexual act." *State v. Watson*, 321 Md. 47, 57 (1990). Identifying the criminal offense without further explanation can be "misleading and prejudicial." *Id.* at 55. Because we stick with the name of the offense, second-degree rape, a name that carries such a prejudicial implication, is not a veracity-impeaching offense. *See Ricketts*, 291 Md. at 713 ("If the crime is so ill-defined that it causes the factfinder to speculate as to what conduct is impacting on the defendant's credibility, it should be excluded.").

Third-degree sexual offense is not a veracity-impeaching offense either. Like a second-degree rape offense, the name "third-degree sexual offense" does not indicate the nature of the offense and may be misleading. *Watson*, 321 Md. at 55. The relevant statute criminalizes engaging in sexual contact with another if the victim is under the age of fourteen and the accused is at least four years older than the victim. Md. Code (2002, 2021 Repl. Vol.), § 3-307 (a)(3) of the Criminal Law I Article. But the statute also criminalizes nonconsensual sexual contact through violence. Md. Code (2002, 2021 Repl. Vol.), § 3-307 (a)(1) of the Criminal Law I Article. None of Mr. Spicuzza's charges allege violence. For these reasons, merely identifying a third-degree sexual offense does not assist a factfinder in weighing a defendant's veracity.

Because none of Mr. Spicuzza's charges qualify as veracity-impeaching offenses,

the circuit court correctly granted the State's *motion in limine* to exclude Mr. Spicuzza's witnesses from testifying to his honesty *before* trial.

b. The State's cross-examination did not warrant rehabilitation.

At trial, though, Mr. Spicuzza did testify, and this raises another relevance question: whether the proffered testimony should have been admitted to rehabilitate Mr. Spicuzza *after* he testified. Mr. Spicuzza argues that the State attacked his character for truthfulness when it impeached him on cross-examination and that he should have been allowed to present character witnesses in response. We disagree.

We borrow from the federal equivalent of Md. Rule 5-608 to assess relevance, given that Maryland's "Rule is derived in part from F.R.Ev. 608." Md. Rule 5-608. The federal rule permits a party to attack a witness's credibility "by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." Fed. R. Evid. 608(a); *accord* Md. Rule 5-616(c)(3) ("A witness whose credibility has been attacked may be rehabilitated by . . . [e]vidence through other witnesses of the impeached witness's character for truthfulness, as provided in Rule 5-608(a)[.]"). The purpose of the federal rule is to encourage direct attacks on a witness's veracity and discourage indirect attacks on the witness's general character. *United States v. Dring*, 930 F.2d 687, 690 (1991) (*citing* Fed. R. Evid. 608 Advisory Comm.'s Note to subdivision (a)). To that end, a defendant's

witness can't rehabilitate themselves with character evidence of truthfulness after a defendant directly attacks their veracity. *Id.* at 691. Rehabilitation is permissible, though, if the attacks are indirect. *Id.*

A direct attack unearths a witness's bias or interest in the case. *Id.* It allows the jury to find the witness is untruthful for a specific reason, not as a function of the witness's general character for truthfulness. *Id.* An indirect attack, on the other hand, comes through opinion or reputation evidence or separate evidence of corruption and requires the jury to infer that the witness is lying currently because that witness has lied in the past. *Id.* Contradictory evidence may constitute a direct or indirect attack on one's character for truthfulness, depending on the circumstances. *Id.* For example, contravening testimony that contradicts a witness will not trigger rehabilitation. *Davis v. State*, 38 Md. 15, 50 (1873). That is also true for vigorous cross-examinations that highlight inconsistencies in the witness's testimony. *Dring*, 930 F.2d at 690–91. But where cross-examination is used as an indirect attack through evidence of bad character, criminal convictions, or misconduct that did not result in a conviction, a trial judge may permit good character evidence if fairness requires it. *Id.* at 692.

The focus here is whether the State attacked Mr. Spicuzza's character for truthfulness indirectly. Mr. Spicuzza asserts that the prosecutor's cross-examination entitled him to present his character witnesses to the jury. This conclusion is unfounded. To be sure, the prosecutor here did attack Mr. Spicuzza's character for truthfulness while cross-examining him. For instance, the prosecutor asked him why H. would feel that he

had destroyed H.'s life, and he replied that it was because he had forbidden H.'s friends from returning to his home. But later, the prosecutor highlighted how Mr. Spicuzza still allowed A.L., one of H.'s friends, to return to the home, testimony from which the jury could infer an inconsistency with Mr. Spicuzza's previous testimony. Mr. Spicuzza also testified to not knowing how to use H.'s phone, an iPhone, so much so that he could not even "make a phone call with it." This was because he did not "understand iPhones" or "how they work." Yet later, when Mr. Spicuzza's mother testified, she revealed that once officers seized his belongings, including his phone, Mr. Spicuzza asked to borrow his mother's phone, an iPhone, "so he could call work . . . ." These were direct attacks, arising in a situation where "a criminal defendant testifying on his own behalf, had a distinct pro-defense bias and a compelling interest in the outcome of the case." *Dring*, F.2d at 692.

In addition, the State did not offer opinion or reputation evidence impugning Mr. Spicuzza's general character for honesty. On rebuttal, the State elicited testimony from four witnesses, none of whom testified that, in their opinion, Mr. Spicuzza was dishonest or untruthful. Moreover, none of those witnesses testified that he retained a reputation for untruthfulness. Nor did these witnesses testify to misconduct that occurred before the incidents giving rise to this case.

What the State did elicit was more contradictory testimony. For example, Mr. Spicuzza testified that on the day he met with his ex-wife, H.'s mother, at Checkers, the two parents discussed the search warrant executed on his apartment and how she needed to answer his calls. He added that although both parents were in separate vehicles that day,

he did not see H., who was in the back seat of her mother's vehicle caring for H.'s younger brother. But when his ex-wife took the stand as one of the State's rebuttal witnesses, she refuted that testimony. She said that when she met Mr. Spicuzza at Checkers, he also told her that he "did not touch the other girls." She added that not only was H.'s younger brother not present that day but also that Mr. Spicuzza and H. had spoken. Again, "[m]ere contradiction among witnesses furnishes no ground, as a general rule, for admitting general evidence as to their character[.]" *Davis*, 38 Md. at 50.

The State also highlighted inconsistencies between Mr. Spicuzza's testimony and the State's rebuttal witnesses. These included conversations between those witnesses and Mr. Spicuzza about whether he had informed them that he would leave the girls alone in his apartment in the early mornings. We cannot say that the circuit court abused its discretion by finding these not to qualify as attacks that could trigger character rehabilitation. *Dring*, 930 F.2d at 692 (reasoning because government emphasized inconsistencies between defendant's testimony and other witnesses' testimony, that did not trigger rehabilitation).

c. Mr. Spicuzza's proffer did not demonstrate an adequate basis for character testimony.

Relevance aside, we turn now to prong two of Md. Code (1974, 2020 Repl. Vol.), § 9-115 of the Courts and Judicial Proceedings II Article: adequate basis. An adequate basis for opinion testimony differs from an adequate basis for reputation testimony. *Devincentz*, 460 Md. at 544. A witness establishes an adequate basis for opinion character

testimony when they have personal knowledge of the individual whose character the witness is evaluating. *Id.* However, an adequate basis for reputation testimony requires the proffered witness to be familiar with the individual's reputation in the relevant community. *Id.*

Since Mr. Spicuzza proffered that his witnesses would opine on his honesty, we focus on opinion testimony. "[T]he extent of the basis for the personal opinion character testimony relates to admissibility, and not just to the weight to be given the testimony by the trier of fact." *Durkin v. State*, 284 Md. 445, 453 (1979). Lack of familiarity, reliance on isolated incidents, or bias may be exposed on cross-examination. *Devincentz*, 460 Md. at 545. Although the governing rules do not "require a particular length of acquaintance or basis of knowledge," *Devincentz* teaches that "[a]bbreviated encounters with an individual that do not furnish an opportunity to evaluate [a witness's] credibility do not provide an adequate basis." *Id.* The requisite basis "must, at a minimum, elicit how long and how well the witness has known the individual." *Id*.

There was an adequate basis in *Devincentz*. *Id.* at 552. In that case, the Court highlighted the length and nature of Mr. Devincentz's son's relationship with the witness—the two had lived together for over six years, which allowed Mr. Devincentz's son to observe the witness's interactions with others. *Id.* at 546–47; *see Hunt v. State*, 321 Md. 387, 424 (1990) (adequate basis to opine regarding defendant's dangerousness where witness was a correctional officer for sixteen years, was Chief of Security at the penitentiary housing defendant, and was aware of and received reports concerning

defendant's infractions while at that facility); *see also Barnes v. State*, 57 Md. App. 50, 59 (1984) (adequate basis where character witness interviewed defendant's mother numerous times over multiple months, but before that, had become acquainted with defendant's mother).

Contrast that case with *Durkin*. There, the defense witness had a single, brief, and limited encounter with the State witness from which he speculated that the State's witness had falsely reported a crime once, and thus, was not truthful. *Durkin*, 284 Md. at 453–54. It was unclear that the false report had occurred, though, and the trial judge excluded the defense witness's opinion. *Id.* at 454; *see Chadderton v. State*, 54 Md. App. 86, 96 (1983) (no adequate basis where witness could not remember when exactly they met defendant, except that it was either 1979 or 1980).

In this case, the circuit court excluded Mr. Spicuzza's witnesses because his proffer was aimed more towards his initial requests for character testimony about his appropriateness with children and general law-abiding nature and not his honesty. The court added that the witnesses' opinions were too conclusory and didn't reference how those witnesses reached those opinions. Mr. Spicuzza argues here that this was an abuse of discretion. We disagree.

Both before and during the trial, Mr. Spicuzza argued that his proffers were sufficient to permit his character witnesses to testify. His witnesses were: Ronald Spicuzza, Veronica Spicuzza, Jeffrey Spicuzza, David Mauer, Gerald Stryker, Matt Felix, Wesley Noll, Shana Schroeder, Donald Behrens, Bill Mosner, and Paula Mosner. The proffers,

which were virtually the same for all these witnesses, stated that the witnesses believed in his good character for the offered traits, that his reputation for each was good, that each witness knew other people who shared the same opinion, and that each witness had extensive contacts with Mr. Spicuzza:

> The following witnesses have advised they believe Brian Spicuzza to have good character as it relates to honesty, peacefulness, appropriateness with children and general law-abiding nature. Each of these witnesses has advised that his reputation for these 4 character traits is good. Each of these witnesses knows many other people who share the same opinion as they do. Each of these witnesses has known Brian for decades and has had numerous extensive contacts with Brian during the time period alleged in the charging document.

For each witness, Mr. Spicuzza included a brief footnote expounding on that witness's connection to Mr. Spicuzza.

We begin with his immediate family. Mr. Spicuzza's parents saw him several times per month, including most weekends, and that contact provided them an opportunity to observe him "interacting appropriately with children." By the proffer's explicit language, though, this had nothing to do with Mr. Spicuzza's honesty. As the trial judge recognized, this was geared toward the other traits, namely, appropriateness with children. The same applied to Jeff Spicuzza. He saw Mr. Spicuzza around two times per month, which allowed him to "observe Brian around children[.]" Again, this did not relay any connection to honesty. *Cf. Devincentz*, 460 Md. at 546 (noting how, as a household member, Mr. Devincentz's son based his testimony on his observations of witness interacting with others).

Next, his friends. Like the parents, the friends' proffered opinions did not opine on Mr. Spicuzza's honesty. The proffer specifically identifies Mr. Spicuzza's behavior around children, that is, his appropriateness with minors. For example, Dave Mauer, Gerald Stryker, Wesley Noll, and Donald Behrens all had opportunities to see Mr. Spicuzza "interact with children." This is not to say that Mr. Spicuzza needed to delineate how each witness watched him exhibit honesty. Nevertheless, he chose to specify for the court what those witnesses did see. For example, Mr. Behrens's "extensive contacts" with Mr. Spicuzza during the time period alleged in the indictment enabled him to observe Mr. Spicuzza's behavior around children. Taking him at his word and seeing no connection to honesty, the trial court did not abuse its discretion by excluding these witnesses.

Remoteness was fatal to the remaining proffers. When assessing whether contacts with an individual were too remote to opine on that individual's character, we consider "whether the witness had sufficient contacts with [the] individual to form a personal opinion, and if the contacts were recent enough to be probative of the individual's character for truthfulness." *Devincentz*, 460 Md. at 549. We recognize that "character simply does not change so fast (if at all), that, for legal purposes, a year can be deemed too remote." *Id.* at 551. *Devincentz* held that a period of fourteen months from when the victim no longer lived with Mr. Devincentz's son was not too distant. *Id.* at 550–51. But the circuit court's decision here is entitled to significant deference, *Durkin*, 284 Md. at 453, and we don't see a basis to overturn the court's conclusion that the remaining individuals' contacts weren't recent enough to establish an adequate basis.

The remaining interactions with Mr. Spicuzza's friends here were too distant as well. Shana Schroeder saw Mr. Spicuzza "about two years ago" before the December 16, 2022 hearing. Their last interaction before that was another two years earlier. Bill and Paula Mosner last saw Mr. Spicuzza in May 2021. Matt Felix, who "was close friends with Brian through sailing since 1999," visited Mr. Spicuzza in the years since, in October 2021. We fail to see, however, how one identifiable visit in over two decades established a basis to opine on Mr. Spicuzza's honesty. *Chadderton*, 54 Md. App. at 96. Overall, these past interactions were too far removed to establish an adequate basis. The trial court did not abuse its discretion.

C. Mr. Spicuzza Opened The Door To The "Why Would She Lie" Question.

Our final inquiry centers around the "Why would she lie," question that the prosecutor asked Mr. Spicuzza during cross-examination. Everybody agrees that this question was improper when the State asked it, and Mr. Spicuzza argues that it violated *Horton v. State*, 226 Md. App. 382 (2016). The State responds that Mr. Spicuzza opened the door to this question.[5] We agree with the State.

[5] The State also argues that Mr. Spicuzza waived this argument "because he never argued that the question was improper because the State did not make the necessary proffer." We disagree. Mr. Spicuzza objected to the "Why would she lie" question, stating that it invited speculation—incompetent evidence. On appeal, he argues that the question, in a vacuum, invited speculation—again, incompetent evidence. This is the same argument except that Mr. Spicuzza now cites the legal authority for it—*Horton*,

Continued . . .

The "opening the door" doctrine is an evidentiary staple. Whether its "analysis has been triggered is a matter of relevancy, which this Court reviews *de novo*." *State v. Heath*, 464 Md. 445, 457 (2019). "Whether responsive evidence was properly admitted into evidence is reviewed for an abuse of discretion." *Id.* at 458. The doctrine allows a trial court to admit evidence that is otherwise irrelevant to respond to: (1) admissible evidence that generates an issue, *Daniel v. State*, 132 Md. App. 576, 591 (2000) (citations omitted), or (2) inadmissible evidence that has been admitted over an objection. *Id.* In both scenarios, the party that offered the evidence opens the door to irrelevant evidence introduced in response. *Id.* In other words, opening the door says that "[m]y opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue." *Heath*, 464 Md. at 459 (citations omitted).

Although the door may be opened to irrelevant evidence, it remains shut to incompetent evidence. *Daniel*, 132 Md. App. at 591. Incompetent evidence is inadmissible for reasons other than relevancy. *Id.*; *see, e.g.*, *Grier v. State*, 351 Md. 241, 261 (1998) (open door doctrine inapplicable to post-arrest silence evidence, which was both incompetent and irrelevant). And the "open the door" doctrine remains subject to Maryland Rule 5-403. Even with the door ajar, the evidence must be excluded if its probative value

226 Md. App. 382 (2016). That case discusses an instance where a "why-would-they-lie" question on cross-examination may not lead to speculation, *i.e.*, when the prosecutor makes a proffer establishing the requisite foundation. *Id.* at 409. The argument is not waived.

"is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

This question here focuses on Mr. Spicuzza's final words on direct examination, where he stated that H. had made a false statement in her testimony, and the State's cross-examination question about H.'s motivation for lying:

> [BY DEFENSE COUNSEL]:
>
> Q. Did you -- sir, I think this might be my last question, okay? When you heard your daughter tell this jury all of those things that she said you did to her sexually, how did you feel? Tell the truth.
>
> A. I -- it – it's indescribable. I don't know if any of you have children, but I don't even think you could imagine what that feels like to sit here and listen to that. That is disgusting to hear that vile, false statement come from your daughter. I can't -- I can't describe it. Nor would I want you to feel what I feel. I wouldn't wish that upon anybody.
>
> * * *
>
> CROSS-EXAMINATION
>
> [BY THE STATE]:
>
> Q. *So why is your daughter lying?*
>
> A. So I believe she feels that I have destroyed her social life.

(Emphasis added). The predicate for the State's question was Mr. Spicuzza stating that H. made a false statement during her testimony:

> [DEFENSE COUNSEL]: Objection. May we approach?
>
> [THE COURT]: Come on up.

(Bench conference.)

[DEFENSE COUNSEL]: Your Honor, we would move for a mistrial and ask to strike the question and the answer. The prosecutor is asking him to speculate about somebody else's mindset, opinions, motives, thought process. It is an inappropriate question. It's not allowed. It's not even allowed when the door is open. It's not only inadmissible, it's incompetent evidence.

[THE COURT]: He's testifying that she's lying.

[THE STATE]: Yeah.

[THE COURT]: The question is why is she lying. It's his answer.

[THE STATE]: Yeah.

[THE COURT]: Why is she lying? I don't think that's an inappropriate question to ask. He says she's lying. Why would she lie? I mean, it's a question she can ask him and he can say I don't know. But he didn't say I don't know. He said I believe she's -- that he destroyed her social life. Follow-up question, why do you believe that?

[DEFENSE COUNSEL]: But Your Honor, the question itself should be stricken. It's an inappropriate, inadmissible question to ask another witness to comment on the thought process of another witness.

[THE STATE]: You just opened the door with the last question. He called her a liar. He just opened the door to that.

[THE COURT]: That's exactly what happened. Overruled.

[DEFENSE COUNSEL]: So you're denying my motion for a mistrial?

[THE COURT]: Yes.

[DEFENSE COUNSEL]: Okay. Thank you.

When Mr. Spicuzza injected H.'s motive as an issue into this case, he opened the door.

1. Mr. Spicuzza introduced H.'s motive.

This issue begins with Mr. Spicuzza's direct examination testimony. For his

testimony to open the door, it needed to be admissible to generate an issue. *Daniel*, 132 Md. App. at 591. We will not address the other scenario that opens the door, given that there was no objection to Mr. Spicuzza stating that H. testified falsely. *Id.*

In Maryland, testimony "from a witness relating to the credibility of another witness is to be rejected as a matter of law." *Bohnert v. State*, 312 Md. 266, 278 (1988). Every "witness is prohibited from testifying that, in his or her opinion, the testimony given by another witness is false. This prohibition applies during cross examination as well as direct examination." *Hall v. State*, 107 Md. App. 684, 692 (1996) (citation omitted).

The Maryland Supreme Court has expressed caution about "were they lying questions." *Hunter v. State* 397 Md. 580 (2007). Those questions and their substantive equivalent[6] can encroach on the jury's province by asking the defendant to judge and weigh other witnesses' testimony and credibility. *Id.* at 595. They can be overly argumentative and create a risk that the jury may conclude that the other witnesses were lying in order to convict the defendant. *Id.* The questions are also unfair because they eliminate the possibility that neither witness is lying. *Id.* at 595–96. They compel the defendant to choose between answering in a way that would allow the jury to infer that the defendant is lying or risk alienating the jury by accusing other witnesses of perjury. *Id.* at 596. Those questions are impermissible in Maryland as a matter of law. *But see United States v. Boyd*,

[6] For example, one of the impermissible "were they lying" questions in that case was, "Can't think of a reason that they would come in and lie about you?" *Hunter*, 397 Md. at 586.

54 F.3d 868, 871 (D.C. Cir. 1995) (highlighting that if defendant testified on their own that officers lied while testifying, prosecutor could then cross-examine defendant as to why officers were lying); *see also United States v. Harris*, 471 F.3d 507, 511–12 (3d. Cir. 2006) (recognizing that while asking witness whether another witness lied is inappropriate for cross-examination, such would be proper if defendant opened the door by testifying on direct examination that another witness is lying).[7]

In this case, Mr. Spicuzza's testimony on direct examination—that H. made a false statement—should not have been admitted. The State should have objected to that response as an improper characterization of another witness's testimony. *Hall*, 107 Md. at 692. That said, Mr. Spicuzza generated this defect. To allow him to object during his cross-examination when the State seeks to explore the very matter he introduced would compound the mistake.

In *Hunter*, the State introduced the defective questioning. 397 Md. at 585. There, while on trial for burglary, the defendant testified and refuted the State's witnesses' testimony suggesting that the defendant was the burglar. *Id.* at 584. The State then asked the defendant five "were they lying questions" that the Court ultimately held were improper. *Id.* at 586. In *Horton v. State*—a case on which Mr. Spicuzza relies—the State

[7] Judge Battaglia, dissenting from the *Hunter* majority, rejected a blanket prohibition of "were they lying questions," citing case law that held them appropriate for focusing a witness on the contradictions and inconsistencies between their testimony and that of other witnesses. *Hunter*, 397 Md. at 605 (Battaglia, J., dissenting) (*citing Harris*, 471 F.3d at 512 (3d. Cir. 2006)).

also inserted the defective questioning. 226 Md. App. 382. The defendant there, while on trial for, among other things, first-degree murder and attempted murder, testified and disavowed the State's witnesses' testimonies that he was the assailant. *Id.* at 389–90. During the defendant's cross-examination, the State asked him what motive the State's witnesses had to lie. *Id.* at 405–06. We placed those questions in the "were they lying" category and held them improper. *Id.* at 409. We noted, however, that there "may be cases in which the party being cross-examined is known to have personal knowledge bearing on the motive of the prior witness to testify falsely, and inquiry into that topic would not be inappropriate in those cases." *Id.* If a proper foundation is laid, where the prosecutor can proffer that the witness *knows* of another witness's motives to lie, such inquiry might be allowed. *Id.*

This case is like the one we imagined in *Horton*. The State introduced the impermissible line of testimony here, as in both *Hunter and Horton*. Without the proper foundation, asking such questions "is mischievous in that it tends to place an improper burden on the accused to account for another's conduct." *Horton*, 226 Md. App. at 408 (citations omitted). But in this case, Mr. Spicuzza generated this issue. He testified during his own direct examination that his daughter had made a false statement during her testimony. His statement sought to account for another's alleged conduct and is the statement that generated the impermissible follow-up question. At that point, the State was allowed to respond: Mr. Spicuzza "injected an issue into the case, and [the State] ought to be able to introduce evidence on that issue." *Heath*, 464 Md. at 459 (citations omitted).

Mr. Spicuzza contends that the "why would she lie" question invites speculation, which is incompetent evidence to which the door could not open. But although we agree that speculation is incompetent evidence, we recognize that from the prosecutor's perspective at the time the State asked the question, there was no reason to think that Mr. Spicuzza would not know H.'s motives. In *Horton*, the defendant had not indicated any personal knowledge of the State's witnesses' motives. 226 Md. App. at 409. Moreover, the record there did not suggest that the prosecutor would know that the defendant had such knowledge. *Id.* The spontaneous nature of the "motive to lie" question made it improper.

In this case, and in contrast, the prosecutor asked the "motive to lie" question only *after* Mr. Spicuzza introduced the issue. The colloquy that ensued after Mr. Spicuzza's objection displayed as much: the prosecutor stated to Mr. Spicuzza's counsel, "You just opened the door with the last question. He called her a liar." Additionally, H. had testified *earlier* that she relied and depended on Mr. Spicuzza and that she had referred to him as her "ride or die[.]" He was her father, and she spent weekends with him, which positioned him as someone likely to know H.'s motives. In light of the evidence adduced at the time Mr. Spicuzza took the stand and his testimony that his daughter had made a false statement while on the stand, the prosecutor had reason to believe that Mr. Spicuzza might know H.'s motive to lie, especially because Mr. Spicuzza volunteered the issue.

2. The balancing test here favors permitting the State's questioning.

This leaves the Rule 5-403 balancing test. Any prejudice here, at best, was

self-inflicted. We recognize that Mr. Spicuzza refuted the evidence produced against him, including, for instance, testifying that he didn't expose himself to H. or her friends. This proved that Mr. Spicuzza could have defended himself without calling his daughter a liar. *But see United States v. Cole*, 41 F.3d 303, 309 (7th Cir. 1994) (determining that because defendant either explicitly or implicitly testified on direct examination that government witnesses were lying, prosecutor was allowed to cross-examine defendant on government witnesses' biases and motives for lying).

Rather than stop there, however, Mr. Spicuzza opted to comment on H.'s credibility. His testimony stating that his daughter had lied also wasn't responsive to the question asked. His attorney asked Mr. Spicuzza how he felt about his daughter's testimony. He took it upon himself to opine that she had lied. We struggle to see how, if he is to present this issue to the jury, he can claim any unfair harm from the State's response, and we see no abuse of discretion in allowing the State to question Mr. Spicuzza as it did.

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