Circuit Court for Montgomery County
Case No. CR-132772

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1058

September Term, 2018

DEANNA MARIE MONEY

v.

STATE OF MARYLAND

Leahy,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 3, 2019

Deanna Marie Money appeals her conviction for second-degree assault in the Circuit Court for Montgomery County. Money stood trial in May 2018 on two counts of second-degree assault based on allegations that she physically abused K, her boyfriend's daughter. Money asserts that the testimony of three separate witnesses at trial—K's school counselor, a social worker, and a pediatrician—included inadmissible hearsay statements allegedly made by K, and that those statements prejudiced the outcome of her trial. The State concedes that the trial court relied on Maryland Rule 5-802.1 erroneously to allow both the school counselor and social worker to relay K's out-of-court statements. But, the State suggests, K's statements to the school counselor (contained in a note destroyed before trial) could have been admitted as evidence of K's then-existing state of mind. With regard to the pediatrician's testimony, the State maintains that the trial court did not err in allowing statements K made to her during a dual-purpose forensic interview.

We hold that the trial court erred by admitting the hearsay testimony by all three witnesses. Because those errors were not harmless beyond a reasonable doubt, we must reverse Money's convictions and remand to the circuit court.

BACKGROUND

When K was 10 years old, in third grade at Cloverly Elementary School in Montgomery County, she delivered a note to her school counselor alleging that her father's girlfriend, Money, abused her. At the time, K lived with her father and her sibling, as well as Money and Money's great aunt, Margie Anne Stoker. The note caused K's counselor, Heather Sobieralski (whom K knew as Ms. S) to report the potential abuse to Child

Protective Services ("CPS") for the Montgomery County Department of Health and Human Services, which started an investigation.[1]

During the ensuing investigation, K described three separate incidences of abuse in interviews with social workers and a pediatrician. The first incident, for which Money was not charged, involved K trying to climb a chair in the living room of her house and Money allegedly dragging K off the chair. The second incident became known as the "tablet incident"—Money allegedly choked K while K was screaming about a game she lost on her tablet. And, in the third incident (the "bedroom incident"), Money allegedly hit K several times because she thought K was not reading like she was supposed to be.

Montgomery County Police Department executed an arrest warrant for Money, and she was jailed for four days from August 15 until she posted bond on August 18, 2017, and was released from jail. The State charged Money by criminal information on November 15, 2017, charging her with separate counts of second-degree assault for the tablet incident and the bedroom incident, respectively.

[1] Pursuant to Maryland Code (2012 Repl. Vol., 2018 Supp.), Family Law Article, ("FL"), § 5-704(a)(1), "each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State: [] who has reason to believe that a child has been subjected to abuse or neglect, shall notify the local department or the appropriate law enforcement agency[.]" "Promptly after receiving a report of suspected abuse or neglect of a child who lives in this State that is alleged to have occurred in this State, the local department or the appropriate law enforcement agency, or both, if jointly agreed on, shall make a thorough investigation of a report of suspected abuse or neglect to protect the health, safety, and welfare of the child or children." FL § 5-706(b). If mental injury is suspected during the investigation, the child must be assessed by two of the following: "a licensed physician," "a licensed psychologist," and "a licensed social worker." FL § 5-706(d).

A. Trial

The circuit court held a three-day jury trial from May 14-16, 2018, during which the State called six witnesses, and Money testified in her own defense. In addition to calling K and Money's great aunt Margie Anne Stoker as witnesses, the State called four witnesses with whom K discussed the alleged abuse: Sara Kulow-Malave, a licensed social worker employed as a forensic interviewer with The Tree House Child Advocacy Center of Montgomery County; Dr. Evelyn Shukat, a pediatrician and the Medical Director at The Tree House; Agathia Chukwuezi (Ms. A), a social worker with Child Protective Services for the Montgomery County Department of Health and Human Services who was assigned to K's case; and Heather Sobieralski (Ms. S), K's school counselor at Cloverly Elementary School.

The State's Case

The State's first witness was K, 11 years old at the time of trial. K testified that Money is "a mother figure who's been with [her] for about five years now and she's been a really good mother figure."

K was in third grade when she first went to Ms. S because she "was kind of scared of [Money] because she would sometimes yell at [K] and it would kind of scare [her] a bit." When asked if she remembered giving Ms. S a note, K did not at first but, when pressed, answered, "I guess I do. . . . I do remember a little bit of it." K testified, however, that she "d[idn't] really remember everything [she] said" to Ms. S other than telling her "about an incident about a tablet between [K] and [Money]." She testified,

> I don't really remember about it. I just know there was an incident about the tablet. I don't really remember what happened though. . . . I think it was the tablet incident but like I said I don't remember what happened but I'm guessing I got a little scared because me and [Money] were still, we weren't, we were still mad at each other. So, when I walked past her I thought she was probably going to smack me or something. But she didn't do that at all.

Explaining the tablet incident, K said she had been playing on her tablet in the living room and got angry when she lost a game, at which point Money took away K's tablet, making the child angrier. Money pinched K's nose and held her hand over K's mouth, but K explained, "I don't think she was trying to make me pass out or do any of that type of stuff." K "could still breath but . . . hardly." She elaborated, however, that Money "didn't make me stop breathing. She didn't try doing that. She just, she didn't do any harm [] or any of that. She just showed me what choking is. She wasn't harming me in any type of way." Despite this, K claimed that she had to kick Money in the chest to get her off. According to K, Money had her hands around K's throat for "about five seconds." Although K was scared and frightened, she testified that she didn't "really lose [her] breath" and denied that it felt like Money was trying to crush her neck.

K described the bedroom incident as follows: "[M]e and [Money] had gotten into an argument and . . . I have a camera in my room for reasons and [Money] was just looking at me and thought I had a smart remark or a . . . smart face and thought I was up to something. But I don't really remember what happened after that."

The State also asked K about her interview at The Tree House. She testified that she didn't remember meeting Dr. Shukat at The Tree House or meeting anyone with red hair, for that matter.

After K's testimony, the State called Money's aunt, Ms. Stoker, who confirmed that K and Money argued often between January and June 2017. She described them both as "very intense, [] and dramatic," and said that Money was "very excitable" and would shout a lot during arguments.

Kulow-Malave, a licensed social worker and forensic interviewer with The Tree House, then took the stand. She explained that she is the first person to meet with a child at The Tree House. She uses open-ended questions to gather information from the child about an allegation of sexual abuse, physical abuse, or domestic abuse. The State sought to play recorded statements that K made during a video interview with Kulow-Malave at The Tree House on June 28, 2017.[2] The court admitted the recorded statements into evidence, over Money's objection, under Rule 5-802.1, and the State published the video to the jury.

During the interview, Kulow-Malave asked about Money. K responded that she used to think that Money was nice but that sometimes Money was mean to her. K told Kulow-Malave about the tablet incident, which occurred about a month after K's 10th birthday. K had been playing a game on her tablet but was "getting really aggravated" because she was losing. Money then took away her tablet, and K was "a little angry about that." K said she asked Money, "why do you have to do that, why are you being mean,"

[2] In chambers the night before trial, the parties agreed to redact certain portions of the statements. Money wanted to redact more portions that she deemed irrelevant, but the court overruled her objection, and Money does not challenge that ruling on appeal.

but Money "started being a lot meaner." K stated that "it's really hard not to get [] mad [at Money]." She explained how the incident escalated:

> [Money] [] pinched my nose and covered my mouth twice to try to make me pass out. And I had to kick her off, [] and I said are you trying to choke me. And I did not mean to say choke, but . . . when I said choke, she said that's not choking, this is choking, and actually choked me like five seconds, and I was starting to lose my breath.

K said she felt like Money was trying to "crush" her neck and did not like that Money "took out all of her anger" on her. Later, when Kulow-Malave asked K to tell her more about the pinching, K said, "Well, she didn't pinch it. She like held it like this."

K then told Kulow-Malave about another incident that made her fear Money more—the bedroom incident. She claimed she was reading but Money thought that she was "just looking in[to] space." K was ready to "scream" and show Money, by holding up her book that she was reading. When K did this, Money thought K was being "smart" and barged into K's room trying to smack her. Money then starting smacking K in the leg, around the arm, and her stomach.

Finally, K told Kulow-Malave about a third incident that happened before the tablet and bedroom incidents.[3] K tried to climb a chair in the living room, but Money grabbed her by her feet and dragged her off the chair, punching K in the middle of her back and stomach. Throughout the interview, K told Kulow-Malave that she was very scared of Money.

[3] Money was not charged for the third incident during which K alleged Money dragged her off the chair and punched her.

Before resting its case, the State also called Ms. S, Ms. A, and Dr. Shukat, each of whom testified (as related in our discussion below), over Money's objections, to out-of-court statements that K allegedly made. Money moved for a judgment of acquittal on both counts, but the court denied the motion, ruling that the jury could find, beyond a reasonable doubt, that neither of the two acts on which she was charged amounted to reasonable parental discipline.

The Defense's Case

Money testified in her own defense. She said that she met K when K was 6 years old and she was 20 years old. The year she started dating K's father, Money and K's father moved into an apartment together and Money developed a closer relationship with K. According to Money, she considers K to be her daughter and refers to K as such. Money testified that her relationship with K prior to January 2017 was good with "little troubles here and there, but that's it," and characterized the relationship as "[m]other and daughter."

From January to June 2017, however, Money admitted that her relationship with K "was really rough"; she and K would yell at each other at least twice a week over those six months. Money admitted that, during one of those arguments, she fractured her hand by punching a wall and had her hand set in a cast. Money also said she would sometimes record videos of K during their screaming matches and send them to K's father at work.

When it came to doing homework, reading, or chores, Money said that K would not listen, which upset Money because she felt that K was "turning [in]to [] somebody else." Money would discipline K by taking away K's computer or her time to watch television,

or by making K clean her room. Money testified that she spanked Money once but that "it didn't feel right[,] that's just up to her father[.]"

Although Money had no memory of an incident in which she hit K as she climbed on a white chair, Money did recall the bedroom incident. According to Money, occasionally, she would catch K on the baby monitor not doing her required daily reading in her bedroom. On the day of that incident, Money

> went in there, asked her several times to read. She, I don't remember exactly what happened after that. I know that she had jumped to the other bed, and I went to go smack her on the butt, and I accidentally smacked her on the leg on accident, and I told her sorry right afterwards.

Money apologized because she "wouldn't hit [K] anywhere else ever, besides the butt."

Money also recalled the tablet incident:

> Like I said, we usually are arguing about homework, or her reading. [S]he was yelling really loud[;] I yelled the same. She said something that really upset me, and I can't remember exactly what it is, but I went over there. I asked, [K] to please stop. She wouldn't stop. So, I took my hand over her mouth, asked her to stop.
>
> And she said you're choking me. I said, no, [K], that's not choking; this is, that was it.

Money said that she put her hand over K's mouth to get her to stop yelling but took off her hand before K told her she was choking. Money denied pinching or putting any pressure on K's nose. Money claimed, instead, that her hand was on K's throat for a "second, [or] two" with "[j]ust enough [pressure] so she c[ould] feel it[] [but she] didn't push up against her or anything." According to Money, this incident occurred in K's bedroom and not in the living room, and K did not complain to Money that Money had hurt her, either during or after the incident.

Verdict and Sentencing

The jury found Money guilty of second-degree assault for the tablet incident and not guilty of second-degree assault for the bedroom incident. On July 18, 2018, the court sentenced Money to one year in prison with all but four days suspended, crediting Money for the four days she served at the time of her arrest. The court also sentenced Money to 18 months of probation, during which time she was required to continue counseling and parenting classes and to obtain psychiatric treatment.

Money's timely appeal followed that same day.

DISCUSSION

I.

The Admissibility of K's Out-Of-Court Statements

Money challenges the trial court's decision to admit testimony from three witnesses at trial: Ms. S, Ms. A, and Dr. Shukat. As already mentioned, the State concedes that the trial court erred in admitting the hearsay testimony by Ms. A. Although the State also concedes that the trial court admitted Ms. S's testimony (the note) based on improper grounds, the State suggests that alternative grounds may have existed to admit her testimony. The State also maintains that the trial court properly admitted Dr. Shukat's testimony. The parties then contest whether the erroneous admission of evidence in this case was harmless. Money describes the State's case as a stool resting on four legs (the testimony of Kulow-Malave, Ms. A, Ms. S, and Dr. Shukat). Each leg lost to inadmissible testimony leaves the stool less able to stand. We address each point in turn, supplying additional facts as necessary.

A. Testimony of Ms. A

Ms. Chukwuezi (or, Ms. A, as K referred to her) was the social worker assigned to K's case. As part of her investigation, she interviewed K on May 26, 2017, and made a contemporaneous report of the interview. The court allowed Ms. A, over Money's objection, to read from the report and relay to the jury what K told her as an exception to the hearsay rule for past recollections recorded, under Rule 5-802.1(e). Apparently, the court believed that K had "adopted" the report when she testified that what she told her social worker was true. According to the report read into the record by Ms. A, K told her,

> she gets scared of her mom who[,] when she is mad, when she's in a bad mood at times[,] yells at her when she does something inappropriate . . . even when she does not mean to. . . . Sometimes her mom screams and says bad things to her. For instance, she had said that she is the worst kid ever. Her mom has also smacked her [] on her butt and on her hand when she's mad . . . and on one occasion has choked her by placing her hand around her neck before stopping.

Further, the report related that K told Ms. A that "[s]he does not feel safe at home. She feels like something bad is going to happen." As to the bedroom incident, K told Ms. A that "[Money] responded [] by hitting her with her fist on [] her thigh. [K] thinks that [Money] had accidentally hit her with her fist. [Money] had struck her three times on her right thigh. [Money] generally does not hit her with her fist." Ms. A also read from her report that the school nurse thought that Money inflicted a dime-sized mark on K's wrist.

On appeal, Money contends that the trial court erred by allowing Ms. A to read her report into the record because K never "made" or "adopted" the report as a past recollection recorded, because the State never showed K the report or asked her about it at trial. The State, for its part, agrees that Ms. A's "testimony about the victim's statements was not

properly admissible as a past recollection recorded" because "there was no testimony establishing that the victim went over the notes taken of her statements, much less their later transcription into a report." The State maintains, however, that any error was harmless beyond a reasonable doubt. We agree with the parties that the challenged testimony was not adopted by K and was therefore inadmissible under Rule 5-802.1(e). We will address the State's harmless-error argument below.

B. Testimony of Ms. S

Ms. S testified about the contents of a note that K gave her alleging that Money abused her. Money objected, arguing that K's statements to Ms. S were hearsay without an exception. The court reasoned that Ms. S could read from K's note as a past recollection recorded under Rule 5-802.1, but the State informed the court that Ms. S had destroyed the note at the end of the school year as part of her typical record-keeping practices. Despite this, the court ruled that the contents of the no-longer-existing note could still come in under Rule 5-802.1 so long as Ms. S could remember the note's contents.

Following this ruling, Ms. S testified that she "[v]aguely" remembered what the note said. She recalled the "content of the note" but "d[id] not remember word for word." Over Money's renewed objection, Ms. S testified that the "note had something to do with [K] needed help because she was being abused." Ms. S said she "remember[ed] having the note and feeling a sense of urgency that I needed to get her." The note caused Ms. S to report the issue to Child Protective Services. On cross-examination, Ms. S testified that she remembered, specifically, that the note contained the words "help," "abuse," and "uncomfortable."

Money argues on appeal that, "[b]y its plain terms, Rule 5-802.1(e) does not apply to K[]'s school counselor's recollection of K[]'s alleged note" for at least three reasons: (1) Ms. S's recollection was not a "written record" as required under the rule; (2) it was not the recorded memory of the witness, Ms. S., but rather, the "vague recollection of the alleged recorded memory of a different witness [K]"; and (3) the witness who created the recollection, K, never adopted the recollection as made—to the contrary, K testified at trial that she did not recall giving Ms. S a note.

The State agrees that "Ms. S's recollection of the destroyed note was not properly admissible under Rule 5-802.1(e)." Alternatively, however, the State suggests that Rules 5-803(b) and 5-1004(a), together, "could arguably" provide a basis for Ms. S's testimony. According to the State, Rule 5-1004(a) would permit Ms. S's recollection of the destroyed note to prove its contents because she did not lose or destroy the note in bad faith, and then Rule 5-803(b)(3) could permit Ms. S to relay "the victim's statements that she needed help because she was being abused[.]" The State elaborated on this point at oral argument before this Court: "[I]t goes to her state of mind that she [] needs help, she's uncomfortable, she's afraid. That's her then-existing state of mind." The State admitted, however, that the word "'abuse' is much harder to justify under [Rule 5-803(b)(3)]."

Money retorts that Rule 5-803(b)(3) "does not apply here." Even if Rule 5-1004(a) [allowing, under certain circumstances, contents of a writing to be proved by evidence other than the original] would permit Ms. S to testify to the contents of the note, Money says, the testimony included "hearsay within hearsay" and there is no exception that permits Ms. S to relay the statements K made during her pre-exam interview. Money

highlights that "under Rule 5-803(b)(3), a statement is admissible only if it is offered to prove the declarant's *present* or *future* state of mind"—not to prove something happened before the declarant made the statement. Further, Money continues, an accusation of abuse is not a "state of mind, emotion, sensation, or physical condition," as required by Rule 5-803(b)(3), and the State offered the statement to prove the past conduct of *Money* rather than K's then-existing condition. At oral argument, Money enunciated this point: "To the extent that K[] alleges that she was uncomfortable or needed help or was afraid, that's not being admitted to show that K[] was feeling that way at the time or what her present or future action would [be], it was admitted to prove, essentially, Ms. Money's intent and Ms. Money's conduct in the past."

Maryland Rule 5-803(b)(3) provides the following exception to the rule against hearsay:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remember or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In other words, "a statement of the declarant's then existing state of mind is admissible to prove the truth of the matter asserted, except that it is generally inadmissible (except in will and probate cases) to prove a fact that purportedly happened before the statement was made." *Edery v. Edery*, 193 Md. App. 215, 234 (2010) (quoting 6A LYNN MCLAIN, MARYLAND EVIDENCE § 803(3):1 at 198-99 (2001)). That is, when the *declarant's* state of mind or physical condition is relevant at trial, statements the declarant made about

his or her state of mind or physical condition at the time may be admissible. *Id.* To avoid the reliability concerns inherent in hearsay, the statement "must purport to relate to a condition of mind or emotion existing at the time of the statement and must have been made under circumstances indicating apparent sincerity." *Nash v. State*, 69 Md. App. 681, 690-91 (1987) (citation omitted).

The state-of-mind exception is not available, however, "to prove a fact [such as an action] which purportedly happened *before the statement was made*." *Conyers v. State*, 354 Md. 132, 160 (1999) (citation omitted). A statement offered to prove a victim's then-existing fear caused by another's past conduct—as opposed to one offered to simply prove past conduct—presents an additional challenge of admissibility. This Court addressed this issue *Banks v. State*:

> If the statement is merely an expression of fear, i.e. "I am afraid of [the defendant]," no hearsay problem is involved since the statement falls within the hearsay exception for statements of mental or emotional condition. *This does not, however, resolve the question of admissibility. Since nothing indicates that the victim's emotional state is in issue in the case, the purpose of the offer of the statement must be to suggest the additional step of inferring some further fact from the existence of the emotional state.* The obvious inference is the inference from the existence of fear is that **some conduct** of [the defendant], probably mistreatment or threats, occurred to cause the fear. *The possibility of overpersuasion, the prejudicial character of the evidence, and the relative weakness and speculative nature of the inference, all argue against admissibility as a matter of relevance.*

92 Md. App. 422, 434-35 (1992) (quoting MCCORMICK ON EVIDENCE § 296 at 853-54 (3d ed. 1984)) (bold emphasis added). Relying on *McCormick on Evidence*, this Court set out that a victim's statement that she feared the defendant because the defendant has threatened her is "generally excluded" both because the evidence possesses the risks

inherent in "expressions of fear standing alone" and because "it seems unlikely that juries can resist using the evidence for [a] forbidden purpose in the presence of specific disclosure of misconduct of [the defendant]." *Id.* at 435 (citation omitted).

Returning to the case on appeal, the trial court should have sustained Money's objection to Ms. S's recitation of K's statements. First, the word "abuse" does not refer to K's state of mind at the time of her declaration; rather, it referred to the past conduct of Money. Moreover, it referred to the alleged past conduct for which Money stood trial. The hearsay exception for a declarant's then-existing state of mind does not allow for statements tending "to prove a fact that purportedly happened before the statement was made." *Edery*, 193 Md. App. at 234 (citation omitted). Permitting Ms. S to testify that K told her that she needed help because of abuse tended to prove the truth of the matter asserted—that Money abused K. This was hearsay and did not fall within the exception contained in Rule 5-803(b)(3).

Second, the words "help" and "uncomfortable" were also problematic, although for a different reason. As this Court set out in *Banks*, a victim's statement of fear may be inadmissible even if it falls within the exception for statements reflecting the declarant's then-existing state of mind. 92 Md. App. at 434. In this case, the dispositive issue at trial was whether Money's physical contact with K constituted second-degree assault or was a justifiable use of force as K's caretaker. *See, e.g.*, *Anderson v. State*, 61 Md. App. 436, 443 (1985) ("As a defense, by way of justification, to what would otherwise be an assault and battery, an individual *in loco parentis* may sometimes, but not always, establish that the force used upon the child was privileged as necessary and proper to the exercise of

domestic authority."). To avail herself of this defense, the physical force that Money used must have been inflicted for a beneficial, disciplinary purpose, and must have been reasonable and moderate, rather than excessive, cruel, or gratuitous. *See id.* at 444-46. The material facts in dispute, then, were Money's intent and the reasonableness of the force she used, given the circumstances. A statement by K expressing fear of Money is at least one inferential step away from proving Money's state of mind (*i.e.*, K's statement expressing fear or discomfort creates an inference that Money's force was probably unreasonable, such that it instilled fear in K, causing the child to seek help). *Banks*, 92 Md. App. at 434-35. The "relative weakness and speculative nature of the inference" was outweighed by "the prejudicial character of the evidence" and the possibility that the jury would misuse K's out-of-court statements for the "forbidden purpose" of proving that Money abused her. *See id.* at 435. Setting aside the reliability issues surrounding the testimony of a witness about a destroyed note that was written by another witness, we hold that to admit these expressions of fear in the context of a note alleging abuse was error.

C. Testimony of Dr. Shukat

The third witness's testimony at issue on appeal is that of Dr. Shukat, the Medical Director at The Tree House. She explained that she typically meets with a child in her office for somewhere between 20 minutes and two hours to discuss any concerns or medical conditions before then bringing the child to a separate room to conduct an exam. At the end of the exam, Dr. Shukat reaches a "medical impression" and, depending on the circumstances, she will alert other agencies about the child's safety and send the child either home or to a hospital.

Dr. Shukat met with and examined K on June 28, 2017, immediately following K's interview with Kulow-Malave. The State elicited testimony from Dr. Shukat about whether she had explained the purpose of the examination to K, attempting to lay a foundation for admitting K's statements to Dr. Shukat as statements made for medical treatment or diagnosis. Defense counsel objected, arguing that Dr. Shukat telling K that she was going to examine her was insufficient to render K's statements admissible when K had already testified that she did not know anything about the exam and was not suffering from any physical ailments at the time. In the court's view, however, K never denied that the interview took place and, therefore, if Dr. Shukat had "explained to her that the purpose of this examination was to see if she was all right, and, if not, to make certain recommendations[,] . . . there's no reason for the [c]ourt to believe that [K] couldn't have comprehended and understood that," as a 10-year-old. Consequently, the court overruled defense counsel's objection.

Outside the presence of the jury, the court then asked Dr. Shukat about the information she conveyed to K about the purpose of the examination. Dr. Shukat explained that, since a social worker had already interviewed K prior to Dr. Shukat meeting her, she told K, as she tells "every other child," that she was a medical doctor and that she would examine her for health and safety reasons. When asked how she was dressed, Dr. Shukat testified that she was dressed the way she was in court; she was not wearing a stethoscope and had not "worn a white jacket in over 30 years." The interview took place in Dr. Shukat's office prior to the exam in a separate exam room. Dr. Shukat described her office

as "a very low-key environment" with "three living room chairs, a lot of stuffed animals, [and] a bucket of lollipops."

At the end of the court's inquiries, defense counsel objected again, arguing that Dr. Shukat's examination was "not set up as a medical history-type interview." The court ruled that Dr. Shukat could testify about the first paragraph of her report and any physical examination she conducted on K. Defense counsel then briefly conducted a voir dire of Dr. Shukat, who explained that she sent her report to Dr. Stephanie Wolf, a social worker, rather than K's treating pediatrician. Defense counsel reiterated his objection, which the court overruled again.

The jury returned, and the State resumed Dr. Shukat's direct examination. Dr. Shukat testified that K told her that "she was choked, and suffocated, punched in the stomach, and hit in the leg . . . by [Money's] casted arm. And she added that she lost her breath for five seconds, and her voice when she was choked[.]" K did not report any tenderness in her neck, nor did Dr. Shukat observe any signs of bruising, tenderness, scarring, broken bones, scratches, marks, or tenderness on K's neck. On redirect, Dr. Shukat clarified that she would not expect to see any injuries because she examined K about a month after the incidents that K reported, and any bruising or petechiae (blood vessels) that would appear from choking would not last longer than two weeks. Consequently, she testified, "the description of how it felt was more relevant to me as a physician, than seeing anything right there."

On appeal, Money challenges the trial court's decision to allow Dr. Shukat "to testify regarding the alleged out-of-court statements K[] made to her during their interview

on June 28, 2017," because the statements were not made for the purposes of medical treatment or diagnosis under Rule 5-803(b)(4). According to Money, K's trial testimony—that she did not recall meeting Dr. Shukat—does not support a finding that she understood her statements to Dr. Shukat were for the purposes of receiving medical treatment or diagnosis. Similarly, Money asserts, "Dr. Shukat's testimony also does not support such a finding: Dr. Shukat could not even recall whether she told K[] 'what she was going to do during the appointment,' let alone that the interview was specifically for medical diagnosis or treatment." (Money's brackets omitted).

Money points to several circumstances that indicate that K did not understand the purpose of the meeting to be receiving medical treatment or a diagnosis include the following: (1) the interview took place "more than one month after the alleged incidents, at a time when K[] did not have any injuries[;]" (2) the interview took place in an office with stuffed animals and lollipops rather than an exam room; (3) "Dr. Shukat was wearing street clothes, not a lab coat or stethoscope[;]" (4) during the interview, K "allegedly reported information that was not germane to medical diagnosis or treatment, such as the fact that K[]'s biological mother had absconded." Finally, Money emphasizes the fact that Dr. Shukat sent her report of the interview to Ms. A, the investigating social worker at CPS, rather than K's pediatrician.

The State responds that the trial court did not clearly err in determining that K's statements to Dr. Shukat were for the purposes of medical treatment or diagnosis. It's the State's position that K's inability at trial to remember speaking to Dr. Shukat "simply does not bear on the issue of what she understood at the time of making the statements[;]" the

trial court could have, instead, "infer[red] from the evidence that [K] understood that she was speaking with the doctor so that she could diagnose and treat her." The State maintains that "the fact that it was a child-friendly environment and that the doctor was not wearing a white coat is not relevant; the victim was ten years old and would presumably understand what a pediatrician was, particularly given the explanations given to the victim by Dr. Shukat."

In reply, Money asserts that the circumstances of the interview—rather than Dr. Shukat's profession as a pediatrician—would have likely informed K's understanding of the interview, and "Dr. Shukat interviewed K[] on the referral of a CPS social worker who was conducting an investigation pursuant to [FL] § 5-706, not because K[] sought medical care." Secondly, Money replies, "K[] was not suffering from any injuries" at the time of the interview and "there was no evidence to suggest that K[] thought that the interview was *part of* the examination." Next, Money contends that Dr. Shukat's normal practice of explaining the exam to children (which she admits she may not have explained completely to K) does not inform the interviewee that the interview—in addition to the exam—is in contemplation of medical treatment. She concludes: "Telling a child who has been referred to The Tree House as part of an assault investigation that Dr. Shukat is going to 'talk with them' and make 'sure they're healthy and safe' would not lead that child to conclude that the interview was for medical treatment or diagnosis in contemplation of treatment."

Maryland Rule 5-803(b)(4) sets out an exception to the rule against hearsay for the following types of statements made for the purpose of receiving medical diagnosis or treatment:

> Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

The rationale for this exception is that "the patient's statements to his [or her] doctor are apt to be sincere when made with an awareness that the quality and success of the treatment may largely depend on the accuracy of the information provided the physician." *Candella v. Subsequent Injury Fund*, 277 Md. 120, 124 (1976). The State bears "the burden to establish that the medical examination exception applies[.]" *Anderson v. State*, 420 Md. 554, 571-72 (2011) (Adkins, J., dissenting).

In *State v. Coates*, the Court of Appeals considered the applicability of this exception to statements a child victim of abuse made to a forensic nurse practioner. 405 Md. 131, 135 (2008). The victim in *Coates* was seven years old when her mother's boyfriend abused her sexually. *Id.* at 134-35, 147. Bresee, a forensic nurse with Shady Grove Adventist Hospital Sexual Abuse and Assault Center, interviewed and examined the victim in her office, 14 months after the abuse. *Id.* at 134-36. She explained to the victim that she needed to get some information, including "where she lives, who she lives with, things she does for fun, her medical history," and review the victim's symptoms "to see if she has any[] stomach aches or earaches or any complaints of illness[.]" *Id.* at 137. During the interview, Bresee used a doll to identify anatomical parts and told the child she is "a special nurse who works with kids who might have been touched in a way that hurt or bothered them" and asked the child to tell her what happened. *Id.* The victim told Bresee that her mother's ex-boyfriend put his private in her private "[a] lot of times" and asked

the victim not to tell anyone. *Id.* at 137-38. At the end of the interview, Bresee asked the victim if there was anything else she should know about Coates and the victim responded by asking, "Are you going to go out and find him now?" *Id.* at 139.

Coates, the victim's mother's ex-boyfriend, objected to this testimony by Bresee coming in under Rule 5-803(b)(4), but the trial court allowed Bresee to testify, and the jury found Coates guilty. *Id.* at 139. This Court reversed, reasoning as follows:

> Simply put, we cannot glean from this record the basis on which [the victim] would have understood that she was being seen for medical treatment or diagnosis, some fourteen months after the last sexual abuse incident, and three weeks after her disclosure to her mother of what had occurred. For example, there is no indication that [the victim] had any understanding, at her age, that she was at continued risk of developing a latent, sexually transmitted disease or HIV. Moreover, most eight-year-olds would not discern emergent circumstances or medical necessity in the absence of any medical complaints or symptoms. And [the victim's] inquiry as to whether Bresee would find Coates suggest[s] that [the victim] did not perceive that there was a medical purpose—or even a dual purpose—for the examination.

175 Md. App. at 628.

The Court of Appeals granted certiorari and affirmed. Although the Court of Appeals held that Bresee's interview had dual purpose: "a legally cognizable present medical reason for interviewing [the victim]" as well as a forensic purpose, the Court reasoned that the "[m]ore important" factor was "whether the declarant believed that there was a medical purpose for the examination." 405 Md. at 143-44. On this dispositive point, the Court of Appeals, noting this Court's rationale quoted above, held that, "[g]iven the facts of this case, [] we agree with the intermediate appellate court that it is unlikely that [the victim] believed that there was a medical purpose for Bresee's examination." *Id.* at 144. The Court then outlined the circumstances that rendered it unlikely that the victim

"had the 'requisite motive for providing the type of sincere and reliable information that is important to diagnosis and treatment.'" *Id.* (quoting *Webster*, 151 Md. App. at 545-56) (brackets omitted). Those circumstances included: "there was no emergency situation that would render [the victim's] statements to Bresee reasonably pertinent to diagnosis or treatment[;]" the victim "did not present with any symptoms at the time of her examination with Bresee[;]" and the victim asked, at the end of the interview, whether Bresee would go out and find Coates. *Id.* at 144-45. The Court reasoned that the lack of symptoms was not dispositive, but, when combined with the other circumstances mentioned and the fact that the victim was only seven years old and 14 months removed from any abuse, her statements "lack the indicia of sincerity that underlie the hearsay exception." *Id.* at 145-46.

Further, the Court concluded that the victim's identification of Coates during the interview also did not fall under the exception in Rule 5-803(b)(4) because it was not "'pathologically germane' to treatment." *Id.* at 147. On this point, the State had argued that Bresee ascertaining Coates's identity was germane because it informed whether the victim was exposed to a sexually transmitted infection. *Id.* at 146. The Court cautioned, however, that Bresee's purpose in giving medical treatment was relevant only if it informed the victim's understanding of the interview's purpose. *Id.* So, even if Bresee was concerned with ascertaining whether the victim may have been exposed to a sexually transmitted infection, the seven-year-old victim was likely unaware that "Coates' identity was medically relevant to her exposure to sexually transmitted infections." *Id.* at 147. "Rather, it appears from the record that the child's motive was to 'get' Coates because,

apparently, he had not been apprehended and her mother had not been able to locate him." *Id.*

Three years after its decision in *Coates*, the Court of Appeals again considered the applicability of Rule 5-803(b)(4) to statements a child victim made during a dual-purpose forensic interview after the child reported abuse. *Anderson*, 420 Md. 554. As in this case, the victim in *Anderson* was interviewed and examined at The Tree House. *Id.* at 557. The victim's mother brought her to The Tree House, at the direction of law enforcement, following a medical exam at the hospital, all on the same day the victim reported the abuse. *Id.* Dr. Boos, the Medical Director at The Tree House at the time, interviewed the nine-year-old victim that same day and wrote a contemporaneous report, which he sent to the investigating detective, outlining the victim's medical history and the substance of his interview. *Id.* at 557-59. According to the report, Dr. Boos asked the victim "about the things she likes to do in her school environment to become more familiar with her" and "reminded her that [he] was a doctor and [they] needed to talk about doctor things," so it was important to either "tell [him] the truth, or if she could not reveal something, to tell [him] that it was secret, but never to lie to [him] because if [he] made a decision based on the lie, [he] might not take proper care of her." *Id.* at 558-59. He asked whether she understood why she needed to see a doctor, and the victim replied, "no, not really." *Id.* at 559. The victim then explained that she had been assaulted sexually, described the assault, and identified her uncle as the attacker. *Id.* at 559-61. The victim, however, told Dr. Boos that she was not having any problems with her body by the time of the interview. *Id.* at 561.

By the time of trial, Dr. Boos had moved on in his career and Dr. Shukat, the new Medical Director, was called to testify at Anderson's trial. *Id.* at 557. Anderson objected to the admission of the report and Dr. Shukat's testimony as to the report's contents, asserting that the report had not been made in furtherance of medical treatment or diagnosis. *See id.* at 557, 561-65. The court ruled that the victim's statements to Dr. Boos were admissible under the rationale in *Coates* because it appeared from the court's review of the report that Dr. Boos communicated to her that he was providing the victim with medical treatment and because the examination occurred the same day she reported the abuse. *Id.* at 564-65.

Anderson was convicted and appealed. The Court of Appeals granted certiorari to review, among other things, the applicability of Rule 5-803(b)(4). *See id.* at 557, 565-66. The Court ruled that "[t]he report was not admissible to establish that [the victim's] statements to Dr. Boos qualified under Md. Rule 5-803(b)(4) as statements made for purposes of medical treatment or medical diagnosis in contemplation in treatment." *Id.* at 565-66. After briefly lamenting the State's failure to secure Dr. Boos's testimony, the Court reasoned that, "[i]t [wa]s doubtful that, even if Dr. Boos testified, he could have" provided a basis for applying Rule 5-803(b)(4) to the report. *Id.* at 566. The Court concluded, "[i]n the case at bar, in which the investigating officers referred [the victim] to Dr. Boos, Dr. Boos's report to [the investigating detective] was inadmissible hearsay when offered to establish [the victim's] state of mind at the time of her interview." *Id.* at 569. Because Dr. Shukat's testimony "was based entirely upon that report" rather than her

opinions of the victim's in-court testimony, the Court ruled that the error was not harmless beyond a reasonable doubt and granted Anderson a new trial. *Id.* at 569-71 & n.3.

As was the case in *Coates* and *Anderson*, the State here failed to establish that K understood the purpose of Dr. Shukat's forensic interview to be for medical treatment or diagnosis. For her part, K denied having any memory of the interview with Dr. Shukat. That leaves us with only the surrounding circumstances to discern K's understanding. Those circumstances militate against a finding that K "had the 'requisite motive for providing the type of sincere and reliable information that is important to diagnosis and treatment." *Coates*, 405 Md. at 144 (quoting *Webster*, 151 Md. App. at 545-56). K told Kudlow-Malave that the tablet incident occurred shortly after her 10th birthday in April 2017. K's visit to The Tree House was not until June 28, 2017, over two months after her birthday and over a month after K first reported the alleged abuse and met with a CPS social worker on May 26, 2017. Dr. Shukat's report made clear that K did not present any symptoms or injuries at the time of her visit. Moreover, Dr. Shukat testified that she did not expect to discover any petechia or visible bruising at the time of the interview—so long after any injury would have occurred. Additionally, "there was no emergency situation" to render K's statements "reasonably pertinent to diagnosis or treatment." *Id.* at 145.

To a lesser extent, the setting of the interview also cuts against finding that a 10-year-old victim would have understood the interview (in addition to the examination that followed) to have had a medical purpose. Dr. Shukat's interview occurred immediately after another forensic interview of K at The Tree House, by Kulow-Malave, a social worker. The interview took place in Dr. Shukat's office, separate from the subsequent

examination in an exam room. As Money points out, even if Dr. Shukat had explained that the ensuing exam was for medical purposes, there was no testimony to suggest that Dr. Shukat also explained that the interview prior to the exam was also for medical purposes. In short, there is little in the record to suggest that, from the perspective of a 10-year-old child, Dr. Shukat's interview was any different than the other forensic interviews K participated in as part of the CPS investigation into Money's conduct.

Further, even though the dispositive issue is K's state of mind and not that of Dr. Shukat, several facts relating to Dr. Shukat's purpose are noteworthy to the extent they may have informed K's understanding of the doctor's purpose in conducting the interview. *See Coates*, 405 Md. at 144-46. Similar to the interview requested by police in *Anderson*, 40 Md. at 557, 569, Dr. Shukat's interview of K was a follow-up to a forensic interview conducted by CPS as part of its investigation into Money's alleged abusive behavior. At the time of the interview, Dr. Shukat admitted that she did not expect K to present any symptoms resulting from the alleged acts of abuse given that they occurred over a month before the interview. Then, following the interview, Dr. Shukat addressed the report of her findings to CPS rather than K's treating physician. That the report in this case was sent to CPS rather than the police department (like in *Anderson*, 420 Md. at 569) is a distinction without a difference, as neither recipient is a medical professional. These facts also tend to reinforce our conclusion that K would not have understood the interview to be for medical treatment or diagnosis. As such, she lacked the "requisite motive for providing the type of 'sincere and reliable' information that is important to diagnosis and treatment," causing her statements to "lack the indicia of sincerity that underlie the hearsay exception"

set out in Rule 5-803(b)(4). *See Coates*, 405 Md. at 143-46 (citation omitted). The circuit court erred in allowing Dr. Shukat to testify to K's statements during her pre-exam interview.

II.

Harmless Error

The State argues that each of the three evidentiary errors were harmless beyond a reasonable doubt. Money replies that each error was prejudicial both individually and cumulatively.

Once an appellant establishes that the trial court admitted evidence erroneously, "the burden falls upon the State, the beneficiary of the error," to exclude beyond reasonable doubt the possibility that the erroneously admitted evidence may have contributed to the guilty verdict. *Nicholson v. State*, 239 Md. App. 228, 244 (2018) (quoting *Dionas v. State*, 436 Md. 97, 108 (2013)), *cert. denied*, 462 Md. 576 (2019). To assess the harm an error caused, this Court conducts an independent review of the record to determine whether the evidence "provided potentially scale-tipping corroboration" or "added substantial, perhaps even critical, weight to the State's case." *Parker v. State*, 408 Md. 428, 447-48 (2009). One tool we employ to measure the weight of the inadmissible evidence is to consider the use the State made of that evidence and whether the State emphasized it during closing arguments. *See Harrod v. State*, 423 Md. 24, 40 (2011).

In this case, Money directs us to the State's closing argument to demonstrate the prejudicial effect of the inadmissible evidence. The State read Ms. A's report *twice* during its closing argument, the latter time in concluding the prosecution's rebuttal argument. The

State also repeated Dr. Shukat's inadmissible testimony twice, and iterated that the three words Ms. S remembered from K's note were "what was important." In the prosecutor's own words during closing, the testimony of these three witnesses "corroborate[d] what K[] said to Sara Kulow-Malave."[4]

Given the emphasis the State placed on this corroborating evidence, we cannot say that its admission into evidence was harmless beyond a reasonable doubt. *See Parker*, 408 Md. at 447-48. Down to its last leg, the State's stool cannot stand.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; CASE REMANDED TO THE CIRCUIT COURT. MONTGOMERY COUNTY TO PAY COSTS.

[4] Before this Court, the State acknowledged that the prosecutor "stressed" Ms. A's report during closing, stating, "it is undeniable that was given some serious significance in closing arguments."