Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000082

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1648

September Term, 2017

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ERIS MURRAY

v.

STATE OF MARYLAND

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Beachley,
Shaw Geter,
Fader,

JJ.

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Opinion by Shaw Geter, J.

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Filed: October 26, 2018

At the conclusion of a six-day jury trial in the Circuit Court for Anne Arundel County, appellant, Eris Murray, was convicted of sexual abuse of a minor, second-degree sexual offense, and sodomy. Appellant was found not guilty on all other charges. The court merged sodomy into second-degree sexual abuse and imposed consecutive sentences of twenty years with all but nine years suspended for sexual abuse of a minor and fifteen years with all but nine years suspended for second-degree sexual offense, followed by probation. Appellant presents the following questions, which have been edited for clarity[1]:

1. Did the court err in allowing an expert witness for the State to testify with regards to the percentage of false child sexual abuse allegations?

2. Did the court err by reading the jury an *Allen*-type charge after receiving a note from the jury indicating a lone juror "will not change"?

We hold the trial court erred in permitting the expert witness testimony regarding the percentage of false child sexual abuse allegations. For the reasons to follow we shall reverse on the first issue, and, thus, we will not address the second issue presented by appellant.

## BACKGROUND

At trial numerous facts were drawn out by the State and appellant through witness testimony and evidence admitted for consideration by the jury. We recount, however, only

[1] Here we include appellant's questions in full as originally presented in his brief: 1. After the first *Allen*-type instruction was given, and after the jury was still deadlocked, with a single juror holding out, saying, "I will not change," and with the jury saying that they "cannot change" the juror's mind and that this juror's verdict was "final," was it an abuse of discretion to deny the motion for mistrial, and instead, give personalized and coercive, *Allen*-type instructions? 2. Was it error to allow an expert witness for the State to tell the jury that only "two percent" of allegations of child abuse are "false"?

those facts necessary for context regarding the testimony of the State's expert witness.

As a part of the State's case-in-chief, a licensed clinical social worker, Crimson Barocca, was called to testify as an expert witness regarding child sexual abuse, delayed disclosure, and grooming. Barocca was qualified as an expert without objection. During cross-examination, appellant's counsel asked Barocca several questions about false allegations of sexual abuse and the following colloquy ensued:

> [Appellant]: Now, you testified about inconsistent statements sometimes given by children who have been victims of child sexual abuse, correct?
>
> [Barocca]: Yes.
>
> [Appellant]: Okay. And now you also in answer to my previous questions indicated there are cases where there are false accusations of child sexual abuse sometimes, correct?
>
> [Barocca]: Really uncommonly, two percent, yes. On falsely accuses – in the literature.

Appellant's counsel then requested to approach the bench and a bench conference followed. Appellant alleged Barocca's response to his last inquiry "was not responsive," and moved "to strike the testimony as unresponsive." In opposition, the State stated, "[h]e doesn't like her answer," but "[t]hat is something different than her not answering the question." The court "sustain[ed] the objection," and asked appellant to "rephrase it," and struck the "two percent" comment. Appellant then declined to ask any further questions of Barocca. The State conducted a brief re-direction of Barocca:

> [State]: Thank [y]ou. And in regards to or based on your experience and based on all the research that you have had the opportunity to review, how common are false allegations of child sexual abuse?

[Appellant]: Oh, objection –

[Barocca]: They are very –

[Appellant]: – Your Honor. May I approach?

[The Court]: Yes.

[Appellant]: This is —, Your Honor.

[The Court]: Counsel, you opened the door by asking her about false allegations.

[Appellant]: Well, now –

[The Court]: And you laid the foundation for scenarios in which it could lead to false allegations. She is entitled to redirect by asking how often that is and in direct examination she mentioned false allegations.

. . . .

[State]: Thank you, Your Honor.

[Appellant]: And —.

[State]: Ms. Barocca, I am going to ask you that question again.

[Barocca]: Okay.

[State]: In just a moment. In your experience, Ms. Barocca, based on the researched [sic] that you have personally have been able to review as part of your occupation, how common are false accusations of child sexual abuse?

[Barocca]: Allegations, false allegations are uncommon. What tends to be occurring in these types of cases is kids falsely deny that abuse has actually occurred. That's the biggest problem with sexual abuse. Is kids – even when directly asked if they have been sexually touched that they will deny that has occurred for some [sic] many reasons.

[State]: And based on the research that you have been able to review

as part of your occupation, is there a percentage of –

[Appellant]: Objection, Your Honor.

[State]: – false –

[Appellant]: Asked and answered.

[The Court]: You asked me to strike it, Counsel.

[State]: Thank [y]ou.

[The Court]: Sustained.

[State]: Is there –

[The Court]: I mean overruled, actually.

[State]: Thank you.

[State]: Is there a – what is the percentage of false allegations of child sexual abuse that you have found?

[Barocca]: About two percent. What happens is that a lot of times allegations are misunderstood. For example, a child says that she has been touched on her vagina by her mother's boyfriend, for instance, or father, or someone. And it is later determined that she was touched on her vaginal area in the context of she was being a bath [sic] and she is a young child and she needed assistance being washed in the bath.

Now, that is not a false allegation, necessarily. It is just not considered sexual abuse. And a lot of cases fall in that category.

Appellant later presented his own expert who testified that 30% of children falsely report sexual abuse. Several other witnesses testified further for the defense. Following deliberations, the jury returned guilty verdicts for Count one, Sex Abuse of a Minor; Count two, Second-Degree Sex Offense; and Count four, Sodomy. This

timely appeal followed.

## DISCUSSION

### I. The court erred when it permitted an expert witness for the State to testify with regard to the percentage of false child sexual abuse allegations.

Appellant argues the court erred when it allowed Barocca to testify that "[a]bout two percent" of sexual abuse allegations made by children are false. Relying on *Bohnert v. State*, 312 Md. 266 (1988), appellant contends the court's ruling inappropriately permitted Barocca to determine the credibility of the complainant-child. Appellant further alleges the court erred when it found appellant "opened the door by asking [Barocca] about false allegations."

In opposition, the State asserts appellant waived this claim since appellant's initial objection was limited to the basis that it was "[a]sked and answered." The State maintains Barocca's statements emanated from her understanding of the relevant literature and that any error was harmless since appellant proffered his own countervailing testimony related to the percentage of false sexual abuse allegations made by children.

We find the State's waiver argument is without merit. To preserve an objection for appellate review, Maryland Rule 4-323 requires that objections "to the admission of evidence . . . be made at the time evidence is offered" and that the "grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." During the State's re-direct examination immediately following a query posed to Barocca by the State regarding "false allegations of child sexual abuse," appellant raised an objection by stating, "[o]h objection." Appellant was then interrupted when the court

interjected to rule that appellant, "opened the door" and "laid the foundation for scenarios [where children make] false allegations." The court further held the State "is entitled to redirect by asking how often that is." Appellant did not give further reasoning for his objection, and neither the court nor the State asked the appellant to explain the grounds of the objection. The State then asked Barocca about false allegations for a second time on re-direct and, at that point, appellant objected again on the basis that the question was "[a]sked and answered."

Relying on *Klauenberg v. State*, 355 Md. 528, 541 (1999), the State contends that appellant's argument regarding Barocca's statistical testimony must be limited to the "[a]sked and answered" basis. The State maintains that appellant waived all other arguments regarding Barocca's statistical testimony because appellant's ground for his second objection relates back to the first, necessarily restricting his argument on appeal. We do not agree. We hold that *Klauenberg* is not instructive here because appellant did not state any grounds for his first timely objection to Barocca's testimony during re-direct. Therefore, appellant is not required to limit his argument. Moreover, Maryland Rule 4-323 does not require parties to explain their objections. Under these circumstances we hold that the issue is preserved for our review.

We now examine "whether the trial judge erred, *as a matter of law*, by allowing testimony 'relating to the credibility of another witness' to be considered by the jury." *Tyner v. State*, 417 Md. 611, 615 (2011) (*citing Bohnert v. State*, 312 Md. 266, 278 (1988)). Under Maryland Rule 5-702, trial courts may admit expert testimony, that helps the trier of fact understand "the evidence" or "determine a fact in issue." Fact finding courts have

"wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular testimony." *Massie v. State*, 349 Md. 834, 850 – 51(1998). However, experts may not opine regarding the credibility of a witness because "the credibility of the witness" is for "the trier of fact . . . the jury." *Battle v. State*, 287 Md. 675, 685 (1980). It is "error for the court to permit to go to the jury a statement, belief or opinion of another person to the effect that a witness is telling the truth or lying." *Hunter v. State*, 397 Md. 580, 588 (2007) (internal quotations omitted).

Appellate courts in Maryland have examined the impact of expert testimony that improperly implicates the credibility of a victim in matters regarding alleged sexual abuse of children on several occasions. For example, in *Bohnert v. State*, a social worker was qualified as an expert witness in the field of child sexual abuse and testified before a jury indicating that, "based on the information that Alicia [the victim] was able to share with me . . . she was, in fact, a victim of sexual abuse." 312 Md. 266, 271 (1988). There, the Court of Appeals held that no person may "qualify as an 'expert in credibility,' no matter what his experience or expertise." *Id.* at 278. Again, in *Hutton v. State*, the Court addressed expert witness testimony proffered by a clinical psychologist with a specialty in child sexual abuse. 339 Md. 480, 502–506 (1995). At trial, the expert was asked "how do you assess credibility," to which the expert replied in relevant part, "I look for the consequences, the post-traumatic stress or whatever which with her, in my opinion, is not in any way faked." *Id.* at 490. The *Hutton* Court held the expert's testimony "commented," "impermissibly," "on the victim's credibility." *Id.* at 504.

The Court of Appeals addressed this same issue most recently, in *Fallin v. State*,

where the State's expert testified "based on her training and expertise, that there were no 'signs' of fabrication or coaching in [the victim's] out-of-court statements to her." 460 Md. 130, 157 (2018). Likening *Fallin* to *Bohnert* and *Hutton*, the Court of Appeals held the expert's testimony that the victim showed no signs of fabrication "was no less problematic," and that the expert's testimony "was indistinguishable from that of a person who operates a lie detector and reports the results." *Id.* at 157–59. Whereas, in *Yount v. State*, we held expert testimony concerning "a psychological phenomenon that may have had a bearing on the credibility of the State's only witness" was admissible. 99 Md. App. 207, 214 (1994). There, we reasoned that the expert's explanation "did nothing to indicate that the victim's version of events rather than the appellant's version of events should be believed," and, as such, the testimony did not invade the province of the jury. *Id.* at 218–19.

Other jurisdictions have also addressed statistical testimony offered by experts in the context of child sexual abuse. The Supreme Court of Hawai'i addressed this issue, in *State v. Kony*, where the State's expert noted "over 95 percent of sexual crimes are committed by males," in a proceeding where the defendant was a male accused of a sexual crime. 375 P.3d 1239, 1251 (Haw. 2016) (internal quotations omitted). The *Kony* Court found "this type of testimony carries the potential of bolstering the credibility of one witness and conversely refuting the credibility of another." *Id.* at 1252. Furthermore, the Supreme Court of Delaware tackled the issue of statistical expert testimony in *Powell v. State*, 527 A.2d 276, 279 (Del. 1987). There, the State's expert indicated in her experience, "in 99 percent of the cases, kids are telling you the truth when they tell you about

intrafamily sexual abuse." *Id.* The defendant in *Powell* was the step-father of the victim and the Supreme Court of Delaware held the "admission of [the expert] percentage testimony deprived [defendant] of his right to have his fate determined by a jury making the credibility determinations." *Id.* at 280.

In the matter before us, expert Barocca testified that "about two percent" of allegations were false. We hold this opinion, like in *Bohnert*, *Hutton*, and *Fallin*, regarding the percentage of false allegations in the research improperly bolstered the credibility of the witness. Suggesting that all but "two percent" of allegations are true is essentially a credibility determination, which is not admissible or permitted in our jurisdiction or others. *See State v. Kony*, 375 P.3d 1239, 1249–51 (Haw. 2016)*; Powell v. State*, 527 A.2d 276, 279 (Del. 1987). As such the court erred as a matter of law in admitting the statistical testimony because it improperly invaded the province of the jury by allowing the expert to make a credibility determination about the victim. Furthermore, "[t]he 'open the door' doctrine does not . . . permit the admission of incompetent evidence—evidence that is inadmissible for reasons other than relevancy." *Daniel v. State*, 132 Md. App. 576, 591 (2000). We hold that the "opening the door doctrine" does not apply to the instant appeal. Further, appellant could not "open the door" to expert testimony which impermissibly bolstered the credibility of a witness because that evidence is incompetent, as there can be no expert on credibility.

**JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED AND REMANDED FOR A NEW TRIAL; COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.**