Circuit Court for Montgomery County
Case No.: 134709C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1929

September Term, 2019

RUDY A. GONZALEZ

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Wells, J.

Filed: June 15, 2021

Appellant, Rudy Gonzalez, was indicted in the Circuit Court for Montgomery County, Maryland, and charged with first-degree rape, second-degree rape, and sexual offense in the third degree. The State nol prossed the offense of sexual offense in the third degree prior to the close of the evidence. The court instructed the jury on first-degree rape, second-degree rape (forcible), and second-degree rape (mentally incapacitated/physically helpless). The jury was unable to reach a verdict on first-degree rape. But the jury convicted Gonzalez of second-degree rape (mentally incapacitated/physically helpless). After he was sentenced to twenty years, with five years suspended, followed by five years' supervised probation, Gonzalez filed this timely appeal. He asks us to address the following questions:

> 1. Did the trial court err, as a matter of law, by refusing to allow evidence of Gonzalez's sexual peacefulness or sexual propriety as either character or habit evidence?
>
> 2. Did the trial court err by disallowing the proffered testimony of David Land?
>
> 3. Did the trial court err by refusing to grant a mistrial when Detective Abigail Ratnofsky testified that after Gonzalez was arrested, he did not ask why he was being taken to the station or why the police were at his home?
>
> 4. Did the trial court err by admitting the recording of the police interview without redaction of inadmissible evidence?
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> 5. Did the trial court err by allowing the State to enter a nolle prosequi as to third-degree sexual offense?
>
> 6. Did the trial court err by denying a mistrial following the State's improper closing and rebuttal arguments?

For the reasons explained below, we reverse, concluding that the trial court committed two errors that seriously compromised Gonzalez's credibility before the jury.

Because these errors are not harmless beyond a reasonable doubt, reversal and a new trial are required. Specifically, first, we conclude that the court erred in not permitting defense testimony regarding Gonzalez's alleged propensity for sexual peacefulness. Second, we conclude that two statements of disbelief that a detective made during Gonzalez's interrogation merit reversal under *Crawford v. State*, 285 Md. 431 (1979). While we do not think that the court abused its discretion in sustaining a defense objection to a prosecutor's question to a detective about Gonzalez's post-arrest silence without providing an additional curative instruction that Gonzalez requested, the jury nonetheless heard impermissible testimony on that topic. That fact weighs against a finding of harmless error in the overall conduct of the trial. Finally, because we remand for a new trial, we decline to address (1) the issue Gonzalez raises regarding defense witness Land's testimony, (2) the propriety of the State's nol pros of the third-degree sexual offense, or (3) any of the issues Gonzalez raises regarding the State's comments during closing argument.

FACTUAL BACKGROUND

On the night of October 8, 2018, G. testified she went to Gonzalez's residence and consumed several shots of tequila.[1] She lost consciousness and awoke the next morning, confused, naked, and in severe pain. A medical examination performed revealed significant bruising to G.'s breasts, as well as severe trauma to her genitals that required surgery and further medical treatment.

[1] For purposes of this opinion, one initial will suffice to identify the victim. *See Raynor v. State*, 440 Md. 71, 75 n.1 (2014) (declining to use sexual assault victim's name for privacy reasons), *cert. denied*, 574 U.S. 1192 (2015).

Testimony at trial established that G. was nineteen years old, had recently arrived in the United States from El Salvador, spoke little English, and worked as a waitress at a restaurant located in Montgomery County. Gonzalez was a customer of the restaurant. Gonzalez, who was fluent in Spanish, spoke with G. on one occasion and offered to help her learn English and find a job other than waitressing. G. was interested. She accepted his business card and agreed to meet with him.

On the morning of October 8, 2018, she called Gonzalez and suggested that he pick her up at around 5:00 p.m. to go to a park so they could talk more about job opportunities. G. met him at the appointed time and place but, instead of taking her to a park, Gonzalez drove her to his own residence. She testified that she reluctantly went with him. Once at the residence, they sat down on a couch in the living room and spoke for a while about family, her employment situation, and El Salvador.

Eventually, according to G., Gonzalez produced a bottle of tequila and two glasses and said, "let's celebrate our friendship." G. took the drink and testified that she initially felt "fine." Gonzalez then gave her several more drinks of tequila. She testified that she had five drinks in all. She testified that she told Gonzalez that her brother would be worried about her and that she should go home, but Gonzalez became upset and insisted that they have one more drink.

G. agreed, but after she took the drink she told Gonzalez she "wasn't going to be able to hold it[.]" She testified that she asked for a lime, and Gonzalez went to the kitchen and returned about five minutes later with a lime wedge. She testified that the lime was "bittersweet" and tasted "different," and that, after she put it in her mouth, "that was it." G.

looked at her phone, saw it was around 7:15 p.m., and again told Gonzalez that she wanted to go home. She remembered that he was "upset and red," and that she passed out soon after.

After she passed out, G. did not remember anything else until she woke up the next morning. At that time, she was in Gonzalez's bed, naked, confused, and unable to move. Gonzalez tried to roust her, telling her it was her "fault that he was going to be late at work." He said that he had washed her clothes and then gave them to her.

G. testified that she sat up and realized she was in pain. She testified there was a "very strong" pain in her "buttocks or it was my anus" as well as around her breasts. She said that she felt weak and had to sit down while trying to dress. She noted that Gonzalez "wanted to get rid of [her] very quickly." He helped her get dressed but was "behaving very weird."

G. testified that Gonzalez never told her that they had sex after she passed out. She likewise stated that he did not tell her that he bathed her after she vomited, nor did he tell her why she was naked. She testified that she "was traumatized" and suspected that "something had happened to me."

G. testified that she then got into Gonzalez's car so that he could take her home. G. said she felt weak and thirsty. So, she asked Gonzalez to drop her off outside a Wendy's restaurant. He did. After he left, G. realized that the Wendy's was closed. By then she said that she was "feeling badly" and "sick," and sat down on the curb at the back of the parking lot. It was then that she looked at her cellphone and noticed that all of her apps were "deactivated." Without objection, she testified that it appeared that it was

"deactivated like, like to prevent that somebody could call me, or the GPS could work and look at me." G. confirmed that she did not deactivate any of the phone's apps.

G. then got up and went over to a dumpster to urinate. When she did, she saw blood coming from her vagina. She was not experiencing her period and testified that this was "a different thing." She laid down and fell asleep.

Afterwards, as the Wendy's was being opened for the day, an unidentified lady awakened G. and took her inside the restaurant. Someone called for an ambulance. While riding in the ambulance to the hospital, G. noticed that her nipples "were red, the tips of my nipples were broken" and she had "several bruises," including her legs. Doctors at the hospital told her that she would need surgery because she "had a large wound in [her] vagina and it was bleeding quite a bit." G. testified that she needed twenty-five days to recover from her injuries. She maintained that she did not have any of these injuries before October 8, 2018.

Later, G. told the police she was with Gonzalez the night before. She told the police that she did not want, nor did she agree, to have sex with him.

The jury heard from Julio Deras, the firefighter-paramedic who treated G. at the Wendy's and transported her to the hospital. Deras said that when he arrived, G. was not wearing socks or a bra, had dirt in her hair, and had blood in her shoes and around her ears. She had low blood sugar and appeared dehydrated. She also complained of pain around her breasts and vaginal area. She told Deras that she was with a man the night before, that she consumed alcohol, and that she did not consent to intercourse. Deras also testified, without objection, that general indications that a person was intoxicated included, but were

not limited to, that "they're throwing up on themselves, they've urinated on themselves[.]"

Dr. Jessica Volz, who the court accepted as an expert in the fields of sexual assault forensic examinations and drug-facilitated sexual assaults, testified, without objection, that vomiting, urination and unconsciousness were possible effects of acute alcohol intoxication. She also testified that "drug-facilitated sexual assault" is "sex that occurs when someone is under the influence of any substance" that affects their ability to resist, consent, or perceive danger. A toxicology screen of G., taken several hours after the incident, was negative for any substances. Dr. Volz testified that, although some drugs could still be in G.'s urine, other drugs, "such as GHB, which some people are familiar with as the date-rape drug, would have completely cleared her system at that point[.]"

Ann Winklbauer, who the court accepted as an expert in forensic nursing, examined G. after she was transported to the hospital. G. told her she was with a man the night before, that she consumed several alcoholic drinks, and that, after her last drink, she did not remember anything else until she woke up naked and in pain on Gonzalez's bed. Winklbauer told the jury that G. had multiple bruises on her body, including her breasts. And, there was swelling, and multiple lacerations and abrasions in G.'s vaginal area. Winklbauer testified that the lacerations to G.'s vaginal area were "not superficial," were to the "deeper tissue," and were most likely caused by blunt force. Due to the nature of her injuries, an on-call gynecologist recommended immediate surgery. During surgery, a "seven-centimeter laceration on the inside of G.'s vagina" was discovered and that injury required sutures.

The jury also heard from Detective Abigail Ratnofsky, an officer assigned to the Sexual Assault Unit in the Montgomery County Police Special Victims Investigations Division, who spoke to G. at the hospital. After hearing G.'s account, which was consistent with G.'s trial testimony, Detective Ratnofsky obtained and, later, executed a search warrant on Gonzalez's residence. Afterwards, the police arrested Gonzalez and he waived his rights provided pursuant to *Miranda*[2] and gave a statement.

In his statement to the police, Gonzalez admitted that he brought G. back to his house and they drank tequila. He said that after G.'s seventh shot, he offered to take her home, but she declined. Instead, as they continued to talk, G. took his hand, and they started to kiss. Gonzalez stated that "one thing led to the other," and they had sex. He explained that, during intercourse, he thought she was menstruating. She told him she was having her period. Gonzalez then noticed that G. was "not very responsive," and he wondered "am I doing the right thing?" He told the detective that they stopped because G. was "pretty tired," and "on the ground." He decided to help her take a shower. Afterwards, he had to carry her to the bedroom, commenting that "it's very hard to carry, I guess, you know, someone that's drunk."

According to Gonzalez's statement, G. vomited several times throughout the night. She also urinated on herself and continued to bleed from her vaginal area. Gonzalez said that he helped her take showers after each episode. The next morning, he agreed to drive

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

her home, but instead, at her request, dropped her off outside a Wendy's at around 7:25 a.m.

Gonzalez and the detective then went into even more detail. Gonzalez stated that: G. took her own clothes off; he knew she was intoxicated; they had sex in the living room; they engaged in vaginal and anal sex; he did not use any "toys" or "foreign objects" with her; and, he ejaculated on her belly. He admitted that he bit her during sex, he engaged in cunnilingus, and that he penetrated her vagina and anus with both his fingers and his penis. He admitted that he washed his bedding afterwards.

After the detective told Gonzalez about G.'s specific injuries, Gonzalez said that he did not cause G. "any of that pain in her private." She never told him she was in pain. He maintained that the sex was consensual, not "forceful," and that "[i]t was just an enjoyable sexual intercourse between two adults."

Other evidence admitted during the State's case-in-chief included a stipulation that appellant's DNA was found on a sperm sample recovered from G.'s chest and that her DNA was found in Gonzalez's apartment. The court also admitted evidence that, on the day of the incident, Gonzalez accessed several pornographic websites, including ones whose titles included the words "fisting," "teen beauty," "anal sex," and "sleeping."

Gonzalez testified on his own behalf. According to him, G. called him to arrange the meeting. He picked her up, and G. asked him, "where do you live," which he thought meant that she wanted to go to his house. He drove her to his residence, and, after a short while, G. asked about a bottle of tequila that Gonzalez had at his bar. Gonzalez testified that they began drinking in the living room. According to Gonzalez, G. poured herself and

drank as many as seven shots of tequila. After G. drank the seventh shot, Gonzalez told the jury that the two began kissing "very passionately."

Gonzalez testified that G. told him to bite her breasts. He performed cunnilingus and placed his fingers in her vagina. They then engaged in vaginal and anal intercourse, which Gonzalez said G. not only initiated but controlled, at times. According to Gonzalez, G. never told him to stop. At some point, Gonzalez said he saw blood "coming out of her vagina," and asked G. if she was having her period. She replied that "I didn't know it was coming today." Gonzalez testified "I didn't think that much about it" and they continued to engage in intercourse until Gonzalez ejaculated on G.'s stomach.

Gonzalez assured the jury that all the while G. appeared to be "having a good time" and was "fine," and did not appear sleepy, not moving, or anything other than "wide awake the whole time." He also testified that it was approximately thirty minutes from the moment they started kissing until he ejaculated.

Afterwards, noticing that there was blood on their bodies, Gonzalez suggested they take a shower. After the shower, G. said she was tired. Because she was still bleeding, Gonzalez said he offered her a "pad" he found in his sister's bedroom and some paper towels. G. "clean[ed] herself" and they both fell asleep in his bed. An hour and a half later, Gonzalez woke to find G. vomiting in the bed. He took her to shower again and helped her clean up. They returned to bed. An hour later, G. started vomiting again. Appellant helped her in the shower a third time. While they were in the bathroom, Gonzalez said that G. urinated on herself.

They returned to the bed, and this time, both were naked. Gonzalez testified that G.

then began "touching" him and then they engaged in vaginal and anal intercourse, during which Gonzalez said G. positioned his penis before engaging in both kinds of intercourse. They finally fell asleep. Gonzalez testified that G. never told him to stop and several times moaned in pleasure, enjoying the encounter.

The next morning, Gonzalez awoke when his alarm clock went off at 7:00 a.m. Realizing he was going to be late for work, he woke G., helped her get dressed and then dropped her off outside the Wendy's, as she requested.

Gonzalez was adamant that he did not rape G. He did not have sex with her or touch her sexually while she was asleep. According to Gonzalez, G. appeared to be enjoying herself. He also denied placing any foreign objects or his fist into G.'s vagina; he did not hurt her. He denied the use of a date rape drug.

On cross-examination, Gonzalez agreed that G. was not bleeding from her vaginal area when they first disrobed nor when he performed cunnilingus. He did not see any injuries near her vagina or her anus at that time.

Gonzalez agreed that G. was drunk when they first had sex. He agreed that, when he first took her to the shower, he was worried that she might "hurt herself" "[b]ecause of her drunkenness." He said that he "was definitely helping her" and "was just making sure she was fine." He also agreed that she began bleeding while they were having intercourse, and that she was still bleeding afterwards.

After G. vomited a third time, and after the third shower, he left, and came back to the bathroom to find that she urinated on herself. He agreed that he worried that she would injure herself because she was still intoxicated. He then confirmed that, at around 3:00

a.m., they went back to the bed, naked, and that G. initiated vaginal and anal intercourse for a second time.

As part of the defense case, Gonzalez called several character witnesses. Gwendolyn Washington, Antwand Wardrick, Freddy Calderon Moscoso, Kevin Jenkins, Sr., Aracely Demming, Anna Gonzalez, and Veronica Gonzalez, all testified about Gonzalez's general reputation for peacefulness. All of these witnesses also testified that Gonzalez was "honest" and/or "trustworthy."

Gonzalez also called three additional character witnesses: Wendy Gonzalez, Carolina Ramos, and Sensa Rivas. These witnesses confirmed that they had been in romantic relationships with him and that Gonzalez was a peaceful and honest person. Specifically, Wendy Gonzalez testified that she dated Gonzalez for a year and a half when he was in college; Carolina Ramos testified she and Gonzalez dated for three or four years and had a 17-year-old son together; and, Sensa Rivas agreed, generally, that she and Gonzalez "were together romantically for a while[.]" Wendy Gonzalez testified on cross-examination that she was aware of the allegations in this case. According to her, those facts, and the fact that Gonzalez admitted to lying to the police, would not change her opinion of him. On cross-examination, Sensa Rivas testified that she was not aware that Gonzalez was dating another woman at the same time that she was dating him. Rivas admitted that, even if she knew that Gonzalez had lied to the police, she still believed he was "an honest person."

Additional facts will be included below.

DISCUSSION

I.

Gonzalez first contends the trial court erred by refusing to admit character evidence of his "sexual peacefulness or sexual propriety" as either character or habit evidence. The State responds that the court properly declined to admit this evidence and that any error was harmless beyond a reasonable doubt.

Before trial, defense counsel moved to admit, as habit evidence under Maryland Rule 5-406, the testimony of five witnesses with whom Gonzalez had a prior sexual relationship, including his former wife; the mother of one of his children; another woman with whom he had a ten-year relationship; a former girlfriend; and, a "one night stand." The defense claimed that these former lovers would testify that their relationships with Gonzalez were not "violent," did not include "some sort of S and M activity," and were, in fact, "conventional."

The State countered that this testimony was not evidence of Gonzalez's "habits." The State argued that the prior relationships were not even relevant. In fact, the State continued, this proposed evidence was character evidence concerning Gonzalez's reputation, not evidence of habit.

The court denied Gonzalez's motion, ruling in part:

> However, I do agree with the State that what defendant proposes to introduce in this case as habit does not equate to acts done with invariable regularity. First, the allegations in this, in this matter, I believe are distinguishable from what the defense is proposing to introduce.
>
> The allegation is that the alleged victim in this case was unconscious during the time where, as I understand, what the proposing [sic] to introduce

> is mutual voluntary acts by two individuals participating in sexual acts. So, I don't think we have the same situation that can be shown to be how someone responds. And again though, I believe that this, the allegation of sexual activity in the past is not something that equates to acts done with invariable regularity. And that's what would need to be shown. So, given that, the defendant's motion in limine regarding habit evidence is denied.

Defense counsel then raised an alternative argument under Maryland Rule 5-404(a), asking that the proffered testimony be admitted as "character evidence of sexual peacefulness" and "sexual nonviolence with female sexual partners."[3] Counsel explained that "here we have people in the direct situation that we're talking about. Not just generally speaking, I know this person well, and I think they are a sexually, you know, peaceful person."

Recognizing that the defense could present evidence, generally, as to Gonzalez's "peacefulness," the State noted that this issue was governed by this Court's then recently issued opinion in *Vigna v. State*, 241 Md. App. 704 (2019), which the Court of Appeals affirmed on harmless error grounds after Gonzalez's trial. *See Vigna v. State*, 470 Md. 418, 454-56 (2020), *cert. denied*, __ S. Ct. __, No. 20-992, 2021 WL 1072314 (U.S. Mar. 22, 2021). The State argued that "there's no such thing as a character for sexual peacefulness in the way that this is a character for peacefulness in general in a community[.]" Gonzalez's proposed alternative strategy would elicit specific instances of conduct and specific acts. In addition, should the defense call these witnesses to testify as to Gonzalez's general reputation for peacefulness and/or truthfulness, the State would be

[3] When asked for the origin of the term "sexual peacefulness," defense counsel replied, "[j]ust came up with it this morning, Your Honor."

able to cross-examine these witnesses about their knowledge of the acts alleged here. *See* Md. Rule 5-405 (a).

But defense counsel clarified that he wanted to go beyond general peacefulness and elicit evidence concerning appellant's "appropriate sexual behavior," "non-violent sexual behavior" or "character for appropriate or nonviolent sexual behavior."[4] However, the State was opposed to a question such as, "based on your sexual relationship with him, do you have an opinion about his peacefulness."

The trial court agreed with the State, relying on this Court's decision in *Vigna*, that "a defendant's reputation for sexual activity, or the lack thereof, bore no correlation to the likelihood that they committed the crimes charged," and that [s]imply put, one's reputation for moral decency is not pertinent[.]" *Vigna*, 241 Md. App. at 720 (citing *State v. Jackson*, 730 P.2d 1361 (Wash. Ct. App. 1986)).[5]

Defense counsel sought to distinguish *Vigna* because it concerned a defendant's reputation around children in a child sex abuse case. *See Vigna*, 241 Md. App. at 710-11, 716; *Vigna*, 470 Md. at 425, 438. Nonetheless, the trial court ultimately denied Gonzalez's motion, stating "[o]ne's reputation for sexual activity, of lack thereof may have no correlation to one's reputation for moral decency[.]"

[4] The State argues on appeal that Gonzalez never argued "sexual propriety" as a ground for admission during trial. We conclude that the issue was adequately preserved for review. *See Starr v. State*, 405 Md. 293, 304 (2008) (recognizing that "an appellant/petitioner is entitled to present the appellate court with 'a more detailed version of the argument] advanced'") (internal quotations omitted).

[5] As will be discussed, the Court of Appeals expressly disagreed with this Court's conclusion on this point. *See Vigna*, 470 Md. at 445-46.

A. Standard of Review of Evidentiary Rulings

In reviewing a trial court's decision to admit or exclude evidence, three different standards of review apply, depending on the nature of the ruling. "The standard of appellate review of an evidentiary ruling turns on whether the trial judge's ruling was based on a pure question of law, on a finding of fact, or on an evaluation of the admissibility of relevant evidence." *Brooks v. State*, 439 Md. 698, 708 (2014). Many evidentiary rulings involve the exercise of discretion, which "will ordinarily not be disturbed on appeal." *State v. Walker*, 345 Md. 293, 324 (1997). For example, such discretionary decisions include whether to admit hearsay statements under an exception, whereas the determination of whether a statement is hearsay is a question of law, which is reviewed *de novo* for legal correctness. *See Brooks*, 439 Md. at 708-09. Likewise, some rulings consist of subsidiary determinations which may themselves be purely factual or discretionary, whereas the conclusion reached on those subsidiary determinations may be a legal question subject to *de novo* review. *See Walker*, 345 Md. at 325.

B. Habit

Appellant argues that evidence of his sexual peacefulness was admissible as habit. Maryland Rule 5-406 provides that "[e]vidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." As the Court of Appeals explained, "[e]vidence that a person has a habit of doing something is relevant to show that the person engaged in the conduct on a particular occasion." *Ware v. State*, 360 Md. 650, 676 (2000) (holding that evidence that appellant was in the habit of

carrying a gun made it more likely he had a gun on the day of the murders), *cert. denied*, 531 U.S. 1115 (2001).

"Habit" may be proved in three ways:

> (1) opinion testimony by the individual himself or herself, who has lost his or her memory as to the specific occasion; (2) opinion testimony by another person who has seen the individual take that action on repeated occasions; or (3) fact testimony by various individuals who have seen the individual take the particular action on different occasions.

5 Lynn McLain, *Maryland Evidence*, § 406.1, at 894-95 (3d ed. 2013) (footnotes omitted); *accord Ware*, 360 Md. at 676 n. 8.

"Habit" evidence should be distinguished from general evidence of "character." Professor McLain explained that,

> [c]ases excluding "habit" evidence confuse their readers by employing, instead of the legal term of art "habit," the lay meaning of the word "habit" as a synonym for what is embraced in the broader legal term, "character." For instance, although the term "drinking habits" is often used in common parlance, evidence of irregular, prior incidents of intoxication will be inadmissible as "habit" evidence, as insufficiently specific, regular, and repeated.
>
> As another example, someone who has the character traits of cleanliness and or orderliness might wash her kitchen floor every Saturday morning and might keep her tax receipts in a particular file folder. Evidence of the floor-washing would be "habit" evidence under Rule 5-406, as would evidence of keeping the tax receipts. But evidence of general cleanliness and orderliness would be character evidence, falling within the exclusionary "propensity rule" of Md. Rule 5-404.

Maryland Evidence, § 406:1 at 890-91 (footnotes omitted); *Compare, e.g.*, *Rosebrock v. E. Shore Emergency Physicians, LLC*, 221 Md. App. 1, 22 (evidence that a doctor always examined a patient's spine before removal from a backboard was admissible habit evidence), *cert. denied*, 442 Md. 517 (2015); *Barnes v. State*, 57 Md. App. 50, 60-61

(evidence as to non-smoking habits of work crew was relevant to whether fire was started accidentally by workers' smoking or was result of arson), *cert. denied*, 299 Md. 655 (1984), *with United States v. Wright*, 206 F. Supp. 2d 609, 615 (D. Del. 2002) (finding the court properly excluded evidence, in a money laundering case, that a witness carried large sums of cash and "frequently" made cash loans because the witness' "general tendency to loan money to friends was not so reflexive or automatic as to qualify as a habit"), *aff'd*, 363 F.3d 237 (3d Cir. 2004); *United States v. Pinto*, 755 F.2d 150, 151-52 (10th Cir. 1985) (ruling that evidence that defendant, on prior occasions, had acted disoriented while intoxicated and passed out in bars did not support a claim that it was his habit to "wander into the wrong building while intoxicated" in a burglary and rape prosecution).

Here, to the extent that Gonzalez wanted his witnesses to testify concerning his sexual activity on particular occasions, we generally agreethat this evidence was not admissible as "habit." *See, e.g., State v. Whitford*, 799 A.2d 1034, 1053 (Conn. 2002) ("[H]abit evidence is irrelevant to prove willful or deliberate acts"); *Brett v. Berkowitz*, 706 A.2d 509, 517 (Del. 1998) ("Berkowitz' alleged sexual behavior toward his clients, in that it entails some amount of judgment and decision-making, is too complex and is susceptible to too much variation to qualify as habit evidence"). We conclude that the court properly exercised its discretion in excluding this evidence under the habit rationale.

C. <u>Character – sexual peacefulness and nonviolence, sexual propriety</u>

Maryland Rule 5-404(a)(2)(A) provides: "An 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." Rule 5-405 further provides:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of relevant specific instances of that person's conduct.

In *Vigna*, an elementary school teacher was charged with sexually abusing several female students. The defense sought to admit character evidence that Vigna had a reputation for behaving appropriately with children that were in his care. *Vigna*, 470 Md. at 424. The trial court ruled that this evidence was not a "trait of character" within the meaning of Rule 5-404(a)(2)(A). *Vigna*, 470 Md. at 432-33. This Court agreed and declined "to extend the general rule allowing character and reputation evidence to include more granular testimony about a defendant's reputation for sexual propriety or appropriateness with children." *Vigna*, 241 Md. App. at 721. Noting that "very little of the testimony that Mr. Vigna offered did not find its way to the jury" in any event, this Court upheld the trial court's decision to exclude the proffered character evidence. *Id*. at 722.[6]

The Court of Appeals disagreed with this Court's analysis, primarily our reliance on *State v. Jackson*, 46 Wash. App. 360, 730 P.2d 1361, 1364 (1986) and *Hendricks v.*

[6] The Court observed: "the opinion testimony of multiple defense witnesses that Vigna was law-abiding, although broader than the excluded opinion evidence Vigna sought to elicit, ultimately served the same purpose. That is, if the jurors credited the character evidence that Vigna was law-abiding, they logically would have inferred that Vigna was not the type of person who would commit the specific violations of law with which he was charged." *Vigna*, 470 Md. at 455.

State, 34 So.3d 819, 822, 825-26 (Fla. Dist. Ct. App. 2010), from which we reasoned that character traits similar to the trait at issue are not "pertinent" in child sex abuse prosecutions, because sex crimes generally occur in private. But the Court ultimately affirmed on harmless error grounds. *Vigna*, 470 Md. at 445-46, 449, 455-56. The Court of Appeals stated that "[t]he unlikelihood that the character witnesses would have been in a position to witness criminal conduct of the defendant goes to the weight of character evidence, *not* its admissibility." *Id*. at 445 (emphasis added) (quoting *State v. Rothwell*, 294 P.3d 1137, 1143 (Idaho Ct. App. 2013)). The Court explained that, even though such acts may not be committed "in the view of others in the community . . . the same can be said of other cases in which character evidence is routinely admitted." *Vigna*, 470 Md. at 445-46. In those situations, the prosecution can cross-examine the character witness as to his or her knowledge of the allegations at issue in the indictment, thus, marginalizing the persuasiveness of the character evidence. *Id*. at 446. Ultimately, the issue is one of weight of the evidence, and the Court of Appeals declined "to adopt a *per se* rule that character evidence of appropriateness with children in one's custody or care (or similar traits) is never relevant in a criminal case where the defendant is charged with a sex crime against a child." *Id*. at 449.

Instead, the Court dictated a three-part test for trial courts to apply under such circumstances:

> When the State objects to a defendant's proffer of opinion or reputation evidence under Rule 5-404(a)(2)(A) to establish his or her character for a particular trait, the trial court must determine whether: (1) the particular quality identified by the defendant is a "trait of character" within the meaning of Rule 5-404(a)(2)(A); and (2) evidence of such a trait of

> character is "pertinent," *i.e.*, relevant to the trier of fact's consideration of the charged offenses. If the court answers both of these questions in the affirmative, then the court (if requested by the State) should (3) analyze the proffered evidence under Rule 5-403 to determine whether its probative value is substantially outweighed by the danger of unfair prejudice or another circumstance listed in that Rule.

Vigna, 470 Md. at 449 (footnote omitted).

As for the first part of the test, the Court explained:

> [A]t the outset of a hearing regarding the admissibility of character evidence under Rule 5-404(a)(2)(A), the defendant must identify with particularity the quality that the defendant contends is a "trait of character," and must articulate how the proffered trait sheds light on the "kind of person" he or she is. Generally, this should not be a difficult burden to meet. As long as the defendant's proffered character trait is sufficiently specific to distinguish it from "good character generally," the defendant will pass this first part of the test.

Vigna, 470 Md. at 450-51.

As for the second part of the test, the Court stated:

> A court should consider in each instance whether the proffered testimony is evidence of a "pertinent" trait of character, given the specific charges in the case. That is, the court should consider whether such evidence, if believed by the jury, makes it less likely that the defendant committed the charged offense. . . . Thus, while a particular character trait may be relevant in one kind of criminal case, that same trait will not be relevant in others.

Vigna, 470 Md. at 451-52 (internal citation omitted).

Finally:

> If a trial judge determines that the proffered evidence goes to a "trait of character" and that such evidence has probative value to the jury's consideration of the charges against the defendant, then the trial court should conduct a Rule 5-403 analysis (if the State requests that the court do so). If the court concludes that the probative value of the character evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, etc., then the trial court may exclude the proffered evidence.

Vigna, 470 Md. at 453.

The Court of Appeals assumed that the exclusion of the evidence was error, but concluded it was harmless beyond a reasonable doubt. Quoting from this Court's opinion:

> Ultimately, very little of the testimony that Mr. Vigna offered did not find its way to the jury. He called nine defense witnesses who testified that he was law-abiding and truthful. Four were former colleagues, and two worked in Mr. Vigna's classroom alongside him. One character witness, who was both a former colleague and the parent of a former student, testified that she trusted Mr. Vigna "obviously, with the lives of [her] children" and that "as a coworker, I trust him helping me out of some very difficult situations with other children. So [ ] he's very trustworthy and ... very calming to the children that I needed help with." Another stated that he would trust Mr. Vigna with his life. Mr. Vigna's twelve-year-old niece testified that she trusted her uncle. And despite excluding testimony about Mr. Vigna's reputation for interacting appropriately with children, the court allowed multiple parents to testify about the positive experience of having Mr. Vigna teach their children. He was not permitted to elicit testimony that he had the reputation for conducting himself appropriately with children, but the extensive testimony he did elicit supports the "trait" that Mr. Vigna sought to establish.

Vigna, 470 Md. at 454-55 (quoting *Vigna*, 241 Md. App. at 724).

The Court concluded that this testimony "was functionally the equivalent of an opinion that Vigna was the type of person who was appropriate with children." *Vigna*, 470 Md. at 455. The court also observed that other testimony that Vigna was "law-abiding," "although broader than the excluded opinion evidence Vigna sought to elicit, ultimately served the same purpose." *Id*. And:

> Finally, Vigna testified in his own defense and denied that he ever improperly touched any of his students. Indeed, he claimed that touching a student inappropriately was "simply against the fiber of [him]." The defense witnesses who followed Vigna on the witness stand testified to his character for truthfulness. The character evidence that Vigna was a truthful person, if believed, supported Vigna's argument that the jurors should believe his denial of the charges.

Id. at 455-46.

Here, the trial court did not have the benefit of *Vigna*'s three-part test at the time of Gonzalez's trial. However, as this issue is reviewed *de novo*, *see Vigna*, 470 Md. at 437, we are persuaded that Gonzalez's "sexual peacefulness" and/or his "sexual propriety," are character traits within the meaning of the rule and are pertinent to the charged offenses.

Indeed, the State's theory of the case was that G. was intoxicated and may have been given a date-rape drug on the night in question. G. sustained severe trauma to her genitals. The State argued that Gonzalez had sexual intercourse with G., twice, despite knowing that she was intoxicated. The State reminded the jury about Gonzalez's internet searches for "[f]isting and squirting." The State argued that this was a violent rape of a mentally incapacitated and physically helpless young woman. Moreover, as the State acknowledged during closing argument, "[s]ex assaults happen in private, ladies and gentlemen. They don't happen where there are cameras that you can evaluate what went on. This is the nature of this type of crime," and that, therefore, "a lot of this comes down [to] the credibility and who you believe."

In contrast, Gonzalez maintained that his encounter with G. was consensual. He agreed that they both consumed tequila, but that G. initiated the drinking and consumed several shots. According to him, she came on to him, initiating sex after her inhibitions were lowered by the alcohol. She engaged in at least two rounds of vaginal and anal intercourse including asking Gonzalez to bite her nipples on one occasion. Gonzalez made it clear that G. willingly engaged in sex with him and enjoyed do so, even though she was menstruating, and she got sick and vomited from the consumption of too much alcohol.

Under these circumstances, where the accuser and the accused presented two diametrically opposing version of events, we conclude that, the trial court erred in excluding Gonzalez's character evidence for sexual peacefulness, nonviolence and propriety.[7]

D. Harmless Error Analysis

Having concluded that the court erred in excluding the evidence as character evidence, the State argues that any error was harmless beyond a reasonable doubt. The Court of Appeals has explained:

> "When we have determined that the trial court erred in a criminal case, 'reversal is required unless the error did not influence the verdict.'" *Porter v. State*, 455 Md. 220, 234(2017) (quoting *Bellamy v. State*, 403 Md. 308, 333(2008)). In other words, "an error is harmless only if it did not play any role in the jury's verdict." *Id.* at 234 (emphasis omitted). As we do in all cases, where a party has alleged error, we look to see if there was error and inquire into whether the error prejudiced the defendant. If our answer is no, the inquiry ends. If we determine that the error prejudiced the defendant, we analyze how the error prejudiced the defendant. If, as in this case here, we cannot say beyond a reasonable doubt that the error in no way influenced the verdict, we reverse and remand the case for a new trial.

Williams v. State, 462 Md. 335, 352-53 (2019); *see also Dionas v. State*, 436 Md. 97, 108 (2013) ("An error will be considered harmless if the appellate court is 'satisfied that there is no reasonable possibility that the evidence complained of - whether erroneously admitted or excluded - may have contributed to the rendition of the guilty verdict'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

[7] Although the trial court in this case did balance the habit evidence, pursuant to Rule 5-403, addressed *infra*, it did not balance the probative value of the proffered evidence against any danger of unfair prejudice. We note that this balancing is subject to the abuse of discretion standard. *See Vigna*, 470 Md. at 459 (rejecting the suggestion that all such character evidence be admitted without the application of judicial discretion).

The court permitted three defense character witnesses to testify: Wendy Gonzalez, Carolina Ramos, and Sensa Rivas. While each testified that they had a romantic relationship with Gonzalez and that he was a peaceful person generally, none of the witnesses were able to testify specifically about Gonzalez's professed sexual peacefulness and propriety, as he asked. We have determined that it was error for the court not to have allowed these witnesses to testify as to that character trait. Further, the witness' testimony does not fall within the harmless error analysis articulated in *Vigna* because while each witness testified that they had a romantic relationship with Gonzalez, the critical factor was the sexual nature of their relationship and his conduct in that context. The witness' testimony about that aspect of their relationship with Gonzalez was probative of whether he was peaceful with them during sex and whether the jury would have believed that Gonzalez was telling the truth about the consensual nature of his sexual encounter with G.

Here, the State's theory was that Gonzalez took advantage of G. after she became incapacitated because Gonzalez plied her with alcohol. Gonzalez's defense was that G. willingly drank alcohol, and initiated sex, sometime rough sex, during their encounter. Because Gonzalez's guilt rested primarily on who the jury believed, him or G., we cannot conclude that in denying the jury the ability to hear specifically about Gonzalez's sexual peacefulness, the court's error was harmless beyond a reasonable doubt. A key factor in the analysis is that regardless whether the charge was first-degree or second-degree rape, Gonzalez's credibility was at issue. Granted, the trait of sexual propriety or peacefulness would be relevant in a forcible sexual assault, such as first-degree rape. Testimony about Gonzalez's sexual propriety also reflected on whether he would have taken advantage of

G. while she was incapacitated as well as his truthfulness about the entire encounter with her. In particular, we conclude this testimony would have bolstered his claim that it was G., not him, who, for example, insisted that he bite her nipples and initiated vigorous anal and vaginal intercourse over several hours, which would have accounted for the injuries noted in G.'s sexual assault examination. We conclude that the witnesses' testimony on the character trait of sexual peacefulness and propriety may have persuaded the jury that Gonzalez's version of events was more believable. *Williams*, 462 Md. at 352-53; *Dionas*, 436 Md. at 108.

II.

Next, Gonzalez argues for reversal because, although the trial court redacted several statements of disbelief made by the officers during the course of his pretrial interrogation, the court failed to redact five other specific instances where the jury heard the officers question Gonzalez's credibility. Gonzalez takes issue with the following statements:

> "[W]e know that she didn't have those injuries when she came to you."
>
> "So, if she didn't have them before hand, she didn't have them really during, so what happened, what happened after?"
>
> "She wouldn't have really necessarily been able to hide it from you."
>
> "And we know that she didn't have the injuries prior to coming to your house and the 14 hours she was with you, she somehow had these injuries, but you don't know how?"
>
> "How do you explain here injuries then because it had to be you. You, know, I mean she's got the bruising, you know, very high in her vagina and penises don't cause, penises don't cause the kind of bruising and bleeding and stuff that we're seeing."

The State responds that this issue was waived given the extensive motion *in limine* where the parties and the court went through Gonzalez's statement and redacted a number of similar statements by the police. Further, the State concludes that any error was harmless beyond a reasonable doubt.

"[I]n a criminal trial a court may not permit a witness to express an opinion about another person's credibility." *Walter v. State*, 239 Md. App. 168, 184 (2018) (*citing Fallin v. State*, 460 Md. 130, 160 (2018)). This restriction applies to investigating officers' opinions on the truthfulness of an accused's statement. *See Crawford*, 285 Md. at 451 ; *Casey v. State*, 124 Md. App. 331, 339 (1999); *Snyder v. State*, 104 Md. App. 533, 554 (1995).

The State acknowledges this general rule but first asserts that Gonzalez waived any objection to the listed statements. Relying on *Crawford v. State*, 285 Md. 431 (1979) and *Walter v. State*, 239 Md. App. 168 (2018), Gonzalez moved *in limine* to exclude certain statements that Detective Ratnofsky made during her interview with him. The court understood Gonzalez's motion to involve approximately thirty-one (31) statements of disbelief by the officers involved. The court agreed that the detectives' statements that indicated that they thought appellant was lying, would be redacted. The court then heard argument about the remaining challenged statements. And, during argument on the motion, defense counsel conceded that some of the statements at issue were admissible.

During the trial, as Gonzalez's custodial statement was played during Detective Ratnofsky's direct examination, defense counsel renewed his objection on the following grounds:

[DEFENSE COUNSEL]: I, I probably a couple minutes late [sic]. But I just need to say on the record that I would readopt all the arguments with respect to the *Crawford*, the *Crawford* motions.

THE COURT: Okay.

[DEFENSE COUNSEL]: Right, and I'm hoping that even if I'm a little late here I hope Your Honor is okay with me making the objection now.

THE COURT: I'll note your objections and I'll stand with my decision that I made yesterday.

[DEFENSE COUNSEL]: Right, I'm –

THE COURT: Okay.

[DEFENSE COUNSEL]: -- I think I'm required to make them.

THE COURT: Very good, okay.

[DEFENSE COUNSEL]: And all the arguments, both in writing and verbally, with respect to *Crawford*.

THE COURT: Thank you very much.

The jury then heard the rest of Gonzalez's recorded interview. Within that part of the recording, the jury heard the five statements that Gonzalez now challenges on appeal. Although defense counsel never used the talismanic phrase, "continuing objection," we are persuaded that his objection was its functional equivalent and that the issue is adequately preserved for our review. *See Jamsa v. State*, 248 Md. App. 285, 310-11 (2020) (recognizing that an objection to the admission of evidence may be preserved where the ruling was made "immediately" or in "close proximity to the point where the offending evidence was introduced") (citing *Clemons v. State*, 392 Md. 339 (2006) and *Watson v. State*, 311 Md. 370 (1988)); *see also Lockett v. Blue Ocean Bristol, LLC*, 446 Md. 397, 417-18 (2016) ("When, as here, both parties discussed the issue and the court necessarily

decided it in reaching its decision, the issue has been raised for the purposes of Rule 8-131(a)").

As for the merits, in *Crawford*, the Court of Appeals reversed a first-degree murder conviction, holding that the trial court had erred in allowing the jury to hear evidence of the defendant's tape recorded interrogations during which police officers expressed disbelief in the defendant's self-defense claim. *Crawford*, 285 Md. at 443. The Court concluded that "[t]he tapes clearly brought out the obvious disbelief of the police in the accused's version of what happened, a disbelief predicated on what the police had learned from other persons." *Crawford*, 285 Md. at 447. Considering that "[t]he credibility of the accused was all important in the determination by the jury of the validity of her claim throughout the interrogations that she killed in self-defense," the Court held that the challenged comments "tended to seriously prejudice the defense." *Id.* at 451.

In *Casey*, previously cited, Casey was charged with the murder for hire of Michael Allendorf. The defense theory was that, although Casey agreed to beat up Allendorf, he did not kill him. Instead, the defense maintained, the real perpetrator was the State's witness, Kenneth Daughton, who pleaded guilty to hiring Casey to kill Allendorf in exchange for $2,000. *Casey*, 124 Md. App. at 336-37. The State countered the defense theory by introducing a tape recording of Casey's recorded interview with police in which the police repeatedly told Casey they did not believe him. *Casey*, 124 Md. App. at 337-38. Notably, after one officer told Casey that "you can set [sic] there all you want and deny you have any knowledge of what's going on, but we know different. This is your opportunity" to tell us what was going on. Casey retorted, "'I think my best bet right now

is from here on out end this conversation. Speak to a lawyer.'" *Casey*, 124 Md. App. at 338.

This Court agreed with Casey that the evidence should not have been admitted because: (1) the jury heard Casey ask for a lawyer; and, (2) "the investigating officers' opinions on the truthfulness of an accused's statement are inadmissible under Maryland Rule 5-401." *Casey*, 124 Md. App. at 338-39 (quoting *Crawford*, 285 Md. at 451); *see also Snyder*, 104 Md. App. at 554 (concluding the trial court erred in admitting evidence that the investigating detective disbelieved defendant's statement concerning his activities and events surrounding his wife's murder where the State's remaining evidence was largely circumstantial).

Unlike *Casey* and *Crawford*, where interviewing officers clearly expressed their disbelief in the defendant's knowledge of what happened, we conclude the more recent case of *Walter* is more on point. There, Walter was charged with child sexual abuse of his brother's stepdaughter. *Walter*, 239 Md. App. at 182. The court admitted an unredacted video of a detective's interview with Walter over defense objection. *Id.* Noting that Walter denied any involvement in the crimes, we summarized that interview:

> Throughout the interview, the detective employed a number of common investigative techniques in an effort to cause Walter to change his account. She challenged him on whether [the victim] was lying. She repeatedly asked him to explain why [the victim] would suddenly make these allegations, and she disparaged his explanations. On multiple occasions, she expressed the opinion that he had sexually abused [the victim]. She also expressed her disbelief in his denial of culpability. She accused him of dishonesty when he omitted a detail of his conversation with Stepfather, to which she had listened. Her techniques, however, had little discernible impact on Walter's account.

Walter, 239 Md. App. at 182-83, 189.

This Court recognized that, although "[t]he expressions of disbelief were a perfectly legitimate investigative tactic to induce Walter either to confess or to change his account and to introduce inconsistencies that the detective could exploit in further questioning," and did not deny Walter due process of law, the detective's expressions of disbelief were "irrelevant and inadmissible." *Walter*, 239 Md. App. at 189. Indeed, in light of Walter's persistent denials, "the detective's expressions of disbelief had little effect other than to project an aura of official skepticism over Walter's declaration of his innocence." *Id*. at 190. This was exacerbated by the detective's professed assertion of expertise in child sexual abuse cases. *Id*. And, "[t]o make matters worse," the detective's statements did not provide any context to Walter's answers. *Id*.

Ultimately, this Court concluded that the probative value of the unredacted interview was outweighed by the danger of unfair prejudice, and that any error in permitting the jury to hear the unredacted interview was not harmless beyond a reasonable doubt. There was no physical evidence and no confession, and the jury was primarily tasked with assessing the credibility of the victim and Walter. Under those circumstances, the detective's expressions of disbelief may have affected the verdict. *Walter*, 239 Md. App. at 192. We concluded:

> [I]f the State intends to play portions of a recorded interview in which the investigators directly or indirectly express their disbelief in the suspect's statements or their opinion about the suspect's guilt, the court must balance the probative value (if any) of the investigator's comments against their prejudicial effect. In general, where the investigators' comments do not induce the suspect to alter his account or to inculpate himself, a court should prohibit the State from playing those portions of the interview.

Walter, 239 Md. App. at 193 (footnote omitted).

We turn to the statements at issue here and address each in turn. The first statement was: "[W]e know that she didn't have those injuries when she came to you." In context, the detective was attempting to clarify the timing of G.'s injuries to her vaginal area and whether Gonzalez noticed them before they had sex. We do not believe that this statement was either a direct or indirect challenge to Gonzalez's credibility.

The second statement at issue is: "So, if she didn't have them beforehand, she didn't have them really during, so what happened, what happened after?" Again, this went to timing of the injuries and when Gonzalez noticed them. It was not an accusation that he was lying.

Third, Gonzalez asks us to consider this statement: "She wouldn't have really necessarily been able to hide it from you."[8] Gonzalez admitted that G. did not hide any injuries from him. He also maintained that their intercourse was "comfortable," "enjoyable," and that he not been "forceful." We are not persuaded this was a challenge to Gonzalez's credibility.

The fourth statement was made by Det. Ratnofsky and concerned whether Gonzalez knew when G. sustained the injuries. According to the trial transcript, the detective stated:

[8] This version comes from the unredacted transcript of Gonzalez's statement to the police that was identified, but not admitted, at trial and is included with the record on appeal. It differs from the statement in the actual trial transcript, which states "[w]e wouldn't have really had to hide it from you." We shall assume *arguendo* that the parties' version from the transcribed statement is correct.

"I know that she didn't have the injuries prior to coming to your house. And the 14 hours she was with you, she has not had these injuries. But, you don't know."[9] In contrast to earlier statements, there is a tone of incredulity in the detective's statement. Although we agree with the State that the detective did not directly call Gonzalez a liar, the impression is that Gonzalez's claims were unbelievable. We are persuaded that the court erred in admitting this statement under *Crawford* and its progeny.

Finally, Gonzalez asks us to consider these statements: "How do you explain her injuries then because it had to be you. You, know, I mean, she's got the bruising, you know, very high up in her vagina and penises don't cause, penises don't cause this kind of bleeding, and bleeding and stuff that we're seeing."[10] We agree with Gonzalez that the statements, "it had to be you," "it had to be with you," are, at minimum, indirect challenges to Gonzalez's credibility and come close to being direct accusations that he caused G.'s injuries. Under *Crawford*, the detective's opinion about Gonzalez's credibility was irrelevant and inadmissible.

In sum, of the five challenged statements, we agree with Gonzalez that it was error for the court to have admitted the last two. The State argues that the error was harmless beyond a reasonable doubt. We disagree.

[9] There is a slight discrepancy from the parties' briefs concerning this statement, because the unredacted transcript in the record omits the pertinent pages, the detective stated, "she somehow had these injuries, but you don't know how?"

[10] Again, there is a slight discrepancy between the version quoted by the parties and the trial transcript. And, the identified unredacted statement omits a number of pages, pp. 95-98, that appear to contain the language quoted by the parties. We shall assume *arguendo* that the language quoted by the parties in their briefs is accurate for our purposes.

This case, unlike the homicide cases in *Crawford* and *Casey*, involved competing versions of events from the alleged victim and the defendant. G. maintained that she did not consent to intercourse with Gonzalez. She insisted that she did not remember what happened between her last drink and when she woke the next morning. Gonzalez, on the other hand, testified that G. voluntarily took shot after shot of tequila, initiated sex with him, even insisting that he bite her nipples, and engaged in a range of sexual acts that lasted several hours. Further, despite vomiting and bleeding, G., according to Gonzalez, again initiated sex. Although there was medical evidence G. of significant medical injuries to G., Gonzalez argued that the medical evidence did not contradict his testimony about a prolonged and sometimes rough sexual encounter, one that Gonzalez insisted G. initiated and enjoyed.

This was primarily a credibility contest and the trial court was required to critically weigh evidence for or against either party. In this instance, the jury heard Det. Ratnofsky's questions directly challenging Gonzalez's credibility. We conclude that the questions prejudiced Gonzalez. Under the circumstances, where credibility was the lynchpin, and especially in combination with the exclusion of the character trait evidence, we cannot be certain that the prejudice was harmless beyond a reasonable doubt. *Dorsey*, 276 Md. at 659, See *Smallwood v. State*, 320 Md. 300, 308 (1990). Indeed, we cannot be certain that the two statements by the detective would not "have persuaded the jury to render a guilty verdict when it would not have otherwise done so." *Gutierrez v. State*, 423 Md. 476, 500 (2011). And while the Court of Appeals has explained, "[a] defendant in a criminal case is entitled to a fair trial, but not necessarily a perfect one," *Id*. at 499 (citing *Hook v. State*,

315 Md. 25, 36 (1989)) we think the errors examined here denied Gonzalez a fair trial. Consequently, we reverse his convictions and remand for a new trial.

III.

Finally, we consider whether the court erred in not granting a mistrial when Detective Ratnofsky was asked about Gonzalez's post-arrest silence. The State argues that the trial court properly exercised its discretion by striking Ratnofsky's testimony, issuing a curative instruction and denying the request for a mistrial. Further, the State asserts that Gonzalez was not prejudiced by the remark. We are not so certain.

The general rule is that prosecutors are barred from impeaching criminal defendants with their decision to remain silent after *Miranda* warnings are given. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). In Maryland, this prohibition extends to post-arrest, pre-*Miranda* silence. *Wills v. State*, 82 Md. App. 669, 677 (1990); *accord Kosh v. State*, 382 Md. 218, 227 n.6 (2004). As the Court of Appeals has explained, "[i]n general, silence is evidence of dubious value that is usually inadmissible under either Maryland Rule 5-402 or 5-403." *Kosh*, 382 Md. at 227 (footnote omitted); *accord* Jezic, et al., *Maryland Law of Confessions*, § 19:6, p. 1005 (2020-21 ed.).

Here, Detective Ratnofsky testified that, after speaking to G. and after obtaining a search warrant for Gonzalez's home, she transported Gonzalez from his home to the police station. At trial, the prosecutor asked Det. Ratnofsky:

[BY PROSECUTOR]:

Q. Did he ask why he was going to the station, or why you were there?

A. No.

Q. At any point did you talk at all –

[DEFENSE COUNSEL]: Objection, can we approach?

THE COURT: You may.

(Bench conference follows:)

[THE COURT]: Yes sir?[11]

[DEFENSE COUNSEL]: I'm going to ask for a motion to strike. I have to ask for a mistrial, sorry. But, he has an absolute right to do nothing at this point. There's any, any statement, whether verbal or physical that is an assertion at this point has zero evidentiary admissibility.

THE COURT: Okay.

[DEFENSE COUNSEL]: So, I ask to motion to strike and grant a mistrial. It's just inappropriate.

[PROSECUTOR]: Your Honor, I –

THE COURT: You want to reply?

[PROSECUTOR]: -- completely agree. I mean, disagree, obviously, with defense. The fact that he opened the door and he went with them. He sat in the car and didn't do anything, didn't say anything, any conversation quite frankly that they have in the car, is necessary in terms of the fact that the State needs to establish that they'd had no conversation about the case, that he didn't ask anything, which could impact any response or non-response she gave in terms of what was going to happen next. She never said anything about him having to talk to her or not having to talk to her. She's going to go through the fact that there was no conversation in the car. There was no conversation at the station outside of the room that they went into. That they went into the room and then we're all going to watch as he is fully Mirandized. If, if the defense thinks that the, it would be helpful to have, I don't even know what a curative instruction would be at this point because what he's saying or not saying has nothing to do with – *the defense is saying or analogizing this to her saying you raped someone, and him not saying anything. And that that non-statement is a statement. Absolutely goes. Case*

[11] The transcript incorrectly attributes this comment, as well as the next, to Defense Counsel and the Court. We have corrected the attribution herein.

law on that, that's a whole separate conversation. That's a different animal. We are not even close to there.

THE COURT: Okay, well I am going to sustain the objection with regard to the motion to strike. I'm going to instruct the jury to disregard the response. I'm denying the request for a mistrial.

[DEFENSE COUNSEL]: And would Your Honor give your curative instruction saying there is no duty for the defendant to speak whatsoever in the presence of the police?

THE COURT: No, I'm not going to go that far. I'm going to say describe your response.

[PROSECUTOR]: May I for a second?

THE COURT: Oh, sure.

[PROSECUTOR]: Not tag team, but the analysis when we're talking about what the defendant says and doesn't say –

THE COURT: Yes ma'am?

[PROSECUTOR]: Obviously, omission's going to be considered, can be considered statements. The analysis is two points. First, is he in custody, of course. Second is he subject to interrogation. And there's no interrogation here, Your Honor. So, there's no – so Miranda doesn't apply. So it just, his failure to ask what he was doing there and his failure to ask what was happening doesn't trigger any suppression. Because suppression is only triggered if he's subject to interrogation and the detective just said very clearly that he was not being subjected to interrogation. So, there's no grounds to exclude it.

THE COURT: Thank you. You've got in on the record. Still going to sustain the objection to strike the response. I am going to instruct the jury not to, to take it into consideration or completely disregard it. The motion for mistrial's denied.

[DEFENSE COUNSEL]: Thank you.

[PROSECUTOR]: Thank you.

(Bench conference concluded.)

> THE COURT: Ladies and gentlemen I'm going to strike the witnesses' response to the last question, and I'm instructing you to disregard it and not consider it at all. Thank you.

(emphasis added).

"An appellate court will not reverse a denial of a mistrial motion absent clear abuse of discretion." *Winston v. State*, 235 Md. App. 540, 570, *cert. denied*, 458 Md. 593, and *cert. dismissed*, 461 Md. 509 (2018). In reviewing a trial court's exercise of discretion, we consider whether it was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Baker*, 453 Md. 32, 46 (2017) (internal citation and quotations omitted). The central question in deciding a motion for mistrial "is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Kennedy v. State*, 436 Md. 686, 696 (2014) (internal citation and quotations omitted). The trial court must, therefore, "assess the prejudicial impact of the inadmissible evidence and assess whether the prejudice can be cured." *Carter v. State*, 366 Md. 574, 589 (2001). "If a curative instruction is given, the instruction must be timely, accurate, and effective." *Id*.

Although it was improper for the prosecutor to have asked the question concerning Gonzalez's response after he was arrested but before he was Mirandized, the trial court acted within its discretion in striking the testimony and instructing the jury to disregard the detective's answer without giving the additional curative instruction Gonzalez requested. But while we conclude the court did not err in this regard, we weigh the fact that the jury heard the improper testimony negatively in a harmless error analysis concerning the two errors we identified above. In assessing the overall fairness of the trial, particularly after holding that the court twice committed reversable error, we cannot ignore the prejudicial impact of the question and answer now under review. We turn to the oft-quoted passage from *Dorsey*

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dorsey, 276 Md. at 659. Critically, the fact remains that the jury heard that Gonzalez remained silent in the face of his arrest on a serious rape charge. As noted, the case was largely a credibility contest between G. and Gonzalez. Under the circumstances, even though the court did not abuse its discretion in striking the detective's testimony without providing the additional curative instruction requested by Gonzalez, the jury's exposure to this testimony weighs against finding harmless error, further supporting our decision to reverse.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED AND CASE REMANDED TO THAT COURT FOR A NEW TRIAL NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1929s19cn.pdf