Circuit Court for Charles County
Case No.: K-15-610

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1083

September Term, 2016

JASON ADAM FALLIN

v.

STATE OF MARYLAND

Leahy,
Reed,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: October 13, 2017

INTRODUCTION

Appellant, Jason Fallin, was charged in the Circuit Court for Charles County with one count of continuing course of conduct against a child, two counts each of third degree sex offense, fourth degree sex offense, sexual abuse of a minor, and second degree assault. Following a trial on April 18-22, 2016, a jury convicted him of one count each of third degree sex offense, sexual abuse of a minor, and second degree assault. Appellant was sentenced to 25 years imprisonment, with all but 21 fyears suspended for sexual abuse of a minor and 10 years concurrent for third degree sex offense, with 5 years supervised probation. Appellant timely appealed and presents the following questions for our review:

> 1. Did the trial court err by allowing a witness who was not a social worker to repeat what the child complainant had told her under the tender years exception to the hearsay rule?
>
> 2. Did the trial court err by allowing a witness to opine, as an expert, on whether another witness showed signs of fabrication or coaching?
>
> 3. Did the trial court err by refusing to give a requested instruction that would have informed jurors that the credibility of another witness is not a proper subject of expert testimony?
>
> 4. Did the prosecutor argue facts not in evidence on a key issue in rebuttal closing argument?
>
> 5. Did the trial court err by admitting irrelevant evidence of Mr. Fallin's failure to report himself to Child Protective Services?

For reasons to follow, we answer these questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

On December 29, 2005, Jason Fallin (appellant) and his girlfriend, Heather L., gave birth to their daughter, S.L. Beginning in 2008, Ms. L. and her daughter lived with appellant's parents, Juliet and Craig Fallin. Appellant did not live there. In 2009, Ms. L. and appellant reached a consent agreement regarding custody, which allowed him to visit S.L. every other weekend.

In the summer of 2012, S.L. disclosed to her mother that appellant had touched her, while she, her mother, and appellant were at the paternal grandparents' home. S.L. reported that they were all sleeping in the same bed when she awoke to find appellant's hands in her underwear, "digging her." The grandparents were out of town. Following the disclosure, S.L. and her mother moved out of the Fallin household and moved into the maternal grandmother's house. Thereafter, Ms. L. petitioned the court for a protective order against appellant. A temporary protective order requiring appellant to cease contact with S.L. was granted; however, the petition for a final protective order was dismissed. Wendy Welch, mother of Heather L., testified that S.L. also disclosed the alleged abuse to her and she reported it to S.L.'s pediatrician and the Charles County Sheriff's Office.

In 2012, while S.L. and her mother lived with Welch, appellant resumed visitation. Following a 2014 visit, S.L. told her mother that appellant had "dug her again." On February 5, 2014, Heather L. reported this incident to the Charles County Sheriff's Office and spoke with Detective Kristin Gross. That evening, the detective interviewed S.L. She told Detective Gross that when she was six, and walking on a rail trail with her father, he

touched her private area while inside a port-a-potty. She stated he then pulled down her pants and took a photograph.

Detective Gross thereafter investigated S.L.'s case. In addition to interviewing S.L., she spoke to Heather L. and Wendy Welch. On March 11, 2014, Detective Gross obtained appellant's cell phone, pursuant to a lawful warrant, and it was searched by an investigator, Bill Winters. No nude photographs of S.L. were found. Forensic Nurse Examiner, Christine Martin, examined S.L. and found no physical trauma. After receiving a referral, Melissa Mohler, a CPS Investigator, interviewed S.L. and prepared a report for court. In September, appellant was arrested and charged with one count of continuing course of conduct against a child, three counts of third degree sexual offense, three counts of sexual abuse of a minor, and two counts of second degree assault.

Appellant, since 2010, had been receiving therapy from Lauresta Krause, a licensed clinical social worker therapist. During a September 2014 session, prior to his arrest, he told Krause about a dream in which S.L. stayed at his house, he had an erection, and he placed his hand in her pants. Appellant said she awoke, he apologized, and she told him, "[t]hat was okay, Daddy." Krause relayed that appellant stated he was only 90% sure it was a dream and 10% unsure. She reported his statements to Child Protective Services (CPS).

Appellant's first trial ended in a mistrial on January 15, 2016. Three months later, his second trial began. S.L. testified that appellant touched her "in the private area" 5 to 6 times while her paternal grandparents were out of town. She also testified about the

incident on the rail trail. S.L. stated that she told her mother, Detective Gross, and a counselor about the incidents.

The State called several other witnesses. Krause testified to appellant's statements during the September 2014 therapy session. Mohler, the CPS investigator, testified, over defense objection, that S.L. told her about the statements that she made to Detective Gross that her father touched her in the private area. S.L also told Mohler that she was mad he "lied about the first two times he sexually abused me and said he didn't when he did," and that he apologized to her for touching her private area.

In addition, Meredith Drum, a licensed clinical professional counselor admitted as an expert in the fields of child abuse disclosure and child abuse clinical counseling, testified. Drum stated she met with S.L. four times in 2012. During the second session, S.L. disclosed that her father "digged her in the front and in the butt" at her paternal grandparents' house while they were out of town. S.L. also told her that she screamed when it happened and that she was afraid to go back to her father's home. During the third session, S.L. said her father had "digged" her and pointed to the vaginal area and back on an anatomical drawing. At the final session, S.L. recalled a second incident, when her father touched her in the living room while they watched Nick, Jr. on television. S.L. also told her there had never been other bad touches and she had never been touched by anyone else. At trial, Drum opined, over defense objection, that she observed no signs that S.L. had been coached or was otherwise fabricating the abuse.

Two witnesses testified for the defense. Irene Posey, appellant's maternal aunt and a licensed clinical professional counselor, stated S.L. never disclosed anything to her that

would have triggered her professional duty to report abuse. Angela Fallin, appellant's sister-in-law, testified that she often brought her son, Alexander, to appellant's house to play with S.L. She stated that in late January or early February of 2014, she and appellant brought their children to the rail trail. After walking about 500 feet, Angela Fallin testified the children got cold and they went home. There were 10 to 12 other people on the trail and S.L. never used a port-a-potty.

Following closing arguments, the jury deliberated and found appellant guilty of third degree sexual assault, sexual abuse of a minor, and second degree assault, relating to the 2012 incident. Appellant brought this timely appeal.

ANALYSIS

I. Did the circuit court err by allowing a witness who was not a social worker to repeat what the child complainant had told her under the Tender Years exception to the hearsay rule?

The "cardinal rule" of statutory interpretation in Maryland is "to ascertain and effectuate the real and actual intent of the Legislature." *Gardner v. State*, 420 Md. 1, 8 (2011) (internal citations omitted). The statute at issue here is Section 11-304 of the Criminal Procedure Article of the Maryland Code, colloquially known as the Tender Years Exception, which allows courts to admit into evidence an out of court statement to prove the truth of the matter asserted in a statement made by a child allegedly subjected to child abuse. Section 11-304(c) states:

> An out of court statement may be admissible under this section only if the statement was made to and is offered by a person acting lawfully in the course of the person's profession when the statement was made who is:
>
> 1. a physician;

> 2. a psychologist;
>
> 3. a nurse;
>
> 4. a social worker;
>
> 5. a principal, vice principal, teacher, or school counselor at a public or private preschool, elementary school, or secondary school;
>
> 6. a counselor licensed or certified in accordance with Title 17 of the Health Occupations Article; or
>
> 7. a therapist licensed or certified in accordance with Title 17 of the Health Occupations Article.

Social workers in the State of Maryland are governed by Maryland Code, Health Occupations, Title 19. In order to practice social work, an individual must be "licensed by the Board [in Maryland]" or "licensed as a certified social worker-clinical." Md. Code, Health Occupations, § 19-301(a).

At issue in this case is the testimony of Melissa Mohler, as to the hearsay statements of S.L. Appellant avows the court erred in allowing Mohler, a CPS investigator, to testify to such statements as "a social worker" under the Tender Years Exception. He argues that Title 19 of the Health Occupations Article requires licensure for social workers and it is undisputed that Mohler is not a licensed social worker. Further, there are four exceptions to the licensure requirement, none of which Mohler fits.

The State responds that under the plain language of the Tender Years Statute, "a social worker" may be an offeror of a child's statement; and the statute does not require licensure. They point to § 11-304(c)(6) and (7), which allow counselors and therapists to testify, but only if they are "licensed or certified in accordance with Title 17 of the Health

Occupations Article." The State says language requiring licensure is not present in the section addressing social workers. Additionally, they argue one may "practice social work" without a license, under § 19-101(m). Because Mohler engages in some of the activities listed under the definition of "practice social work," such as "making assessments," "gathering information," and "making referrals," they contend she should be considered a social worker.

The plain language of § 19-301(a) states:

> Except as otherwise provided in this title, an individual shall be:
>
> (1) Licensed by the Board before the individual may practice social work in this State while representing oneself as a social worker; or
>
> (2) Licensed as a certified social worker-clinical before the individual may practice clinical social work in this State.

§ 19-301(b) goes on to state there are four categories of social workers that are exempt from the state licensure requirement:

> 1) An individual employed by any agency of the federal government while performing the duties of that employment;
>
> 2) An individual licensed as a social worker in another state while responding to an emergency in this State;
>
> 3) An individual who:
>
> i. Is licensed to practice social work in any other state;
> ii. Has an application for a license pending before the Board; and
> iii. Meets requirements established by the Board in regulations; or
>
> 4) A student while pursuing a supervised course of study in a social work program that is accredited or is a candidate for accreditation by the Council on Social Work Education.

On its face, the statute requires licensure for social workers, unless they fit into one of the four enumerated exceptions or Title 19 provides otherwise. Mohler is not a licensed social worker, nor does she fit into one of the four exceptions. The State, nevertheless, claims § 19-101(m) qualifies Mohler as an offeror under the Tender Years Exception because she engages in some of the activities described in Section 19-101(m)(1). It reads[1]:

> "Practice social work" means to apply the theories, knowledge, procedures, methods, or ethics derived from a formal educational program in social work to restore or enhance social functioning of individuals, couples, families, groups, organizations, or communities through:
>
> (i) Assessment;
>
> (ii) Planning;
>
> (iii) Intervention;
>
> (iv) Evaluation of intervention plans;
>
> (v) Case management;
>
> (vi) Information and referral;
>
> (vii) Counseling that does not include diagnosis or treatment of mental disorders;
>
> (viii) Advocacy;
>
> (ix) Consultation;
>
> (x) Education;

[1] Since the time of the trial, the statute defining "practice social work" is now codified at § 19-101(p)(1) and has been amended (effective June 30, 2018), to require those who "practice social work" to have "a baccalaureate or master's degree from a program in social work that is accredited by or a candidate for accreditation by the Council on Social Work Education, or an equivalent organization approved by the Council on Social Work Education."

> (xi) Research;
>
> (xii) Community organization; or
>
> (xiii) Development, implementation, and administration of policies, programs, and activities.

The State's reliance on §19-101(m)(1) is misguided. This section of the statute is definitional and does not independently grant authority for Mohler to "practice social work" without a license. Rather, it describes the term "practice social work" as used elsewhere in the Title, a total of seventeen times. None of those provisions state that a person may practice social work without a license, except for the four exceptions previously listed in §19-301(b). Further, even if applicable, Mohler testified that her formal education or degree was in psychology. Thus, she does not have a formal education in "social work" as required by the statute.

Finally, Mohler did not identify herself as a social worker. At trial, she stated:

> [SAO Attorney Freeman]: Who are you employed with?
>
> [Mohler]: Department of Social Services.
>
> [SAO Attorney Freeman]: And how long have you been employed with Department of Social Services?
>
> [Mohler]: 15 years.
>
> [SAO Attorney Freeman]: Okay. And what are your duties and assignments for Department of Social Services?
>
> [Mohler]: I'm a Child Protective Services Investigator. I investigate allegations of child abuse and neglect.

As such, the admission of her testimony, under the Tender Years Exception, was error. The inquiry, however, does not end here.

The State argues that even if the admission of Mohler's testimony was error, "a review of the record demonstrates that there is no reasonable possibility that the erroneously admitted evidence may have contributed to the guilty verdict." They contend appellant was only convicted of charges relating to the first incident of alleged abuse, which "took place in 2012, when he and S.L. were lying in bed and he touched her genitals." Because "an abundance of other evidence was admitted about the details of the 2012 incident," the "admission of S.L.'s statement to Mohler was harmless."

Appellant argues that Mohler's "testimony was incredibly prejudicial, and the court's error mandates reversal." He claims the following hearsay statements, admitted through Mohler, constituted reversible error: S.L.'s recounting that "her father had touched her inappropriately before;" S.L.'s statement that her father had "lied about the first two times he sexually abused" her; and S.L.'s statement claiming her father apologized to her for the abuse. According to appellant, the testimony regarding the father's alleged apology was particularly damning; as no other witness introduced such evidence and the State repeatedly referenced Mohler, once saying that her testimony was "important in showing you that [S.L.'s] not lying."

On review, unless a 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." *Dove v. State*, 415 Md. 727, 743 (2010) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). In the case *sub judice*, all of the hearsay statements cited by appellant as reversible error, were

admitted either through S.L. herself or one of the witnesses qualified under the Tender Years statute. On direct examination, S.L. testified:

> [SAO Attorney Freeman]: And where…I guess, do you remember where you stayed when [your paternal grandparents] went to North Carolina?
>
> [S.L.] Yes, I did.
>
> [SAO Attorney Freeman]: Where?
>
> [S.L.]: I stayed right at my grandma's house.
>
> [SAO Attorney Freeman]: And which grandma, Abuela or Grandma Welch?
>
> [S.L.]: Um…Abuela.
>
> [SAO Attorney Freeman]: Okay, so they weren't home, but you stayed there?
>
> [S.L.]: Yes, with my mother and my father.
>
> [SAO Attorney Freeman]: Okay, and what happened when you stayed there?
>
> [S.L.]: Um… I was laying on the bed and my father touched me.
>
> [SAO Attorney Freeman]: Can you describe to the jury what you mean by, he touched you?
>
> [S.L.]: He touched me in the private area.
>
> [SAO Attorney Freeman]: Okay, and this is the same private area that you go to the bathroom with?
>
> [S.L.]: Yes.
>
> * * *
>
> [SAO Attorney Freeman]: Did it hurt?
>
> [S.L.]: Yes, it hurt very bad.
>
> [SAO Attorney Freeman]: Okay, and what did he touch you with?

[S.L.]: His hands.

[SAO Attorney Freeman]: Did you tell anyone?

[S.L.]: Yes, I…yes, ma'am, I did.

[SAO Attorney Freeman]: Who did you tell?

[S.L.]: I told my mom and my grandma.

Heather L. confirmed that S.L. disclosed the 2012 incident to her, in the following exchange:

[SAO Attorney Bakhtiary]: When did you move out of the Fallins' house?

[Heather L.]: In 2012, when [S.L.] first made the first disclosure.

[SAO Attorney Bakhtiary]: Based on… so you found out that there was a disclosure of touching?

[Heather L.]: Uh-hum.

[SAO Attorney Bakhtiary]: And based on that, what did you do, if anything?

[Heather L.]: I…I went and got a protective order.

Additionally, S.L.'s maternal grandmother, Wendy Welch, corroborated S.L.'s testimony[2]:

[SAO Attorney Freeman]: Did [S.L.] tell you anything in 2012…did [S.L.] tell you anything that had occurred between her and her father?

[Welch]: Yes, she did.

* * *

[SAO Attorney Freeman]: Okay, so what is it that [S.L.] told you had happened while the grandparents were away in North Carolina?

[2] Wendy Welch's testimony as to S.L.'s hearsay statements was admitted by the court under the "prompt complaint of sexual assault" exception and appellant does not presently take exception to its admission.

> [Welch]: Describe what she told me?
>
> [SAO Attorney Freeman]: Yes.
>
> [Welch]: Her mom was sleeping on one side of the bed, she sleeping next to her mother. There was a big body pillow there. And she woke up with her dad… with his hands in her underwear, digging her.

Meredith Drum, an undisputed licensed social worker admitted as an expert witness in child abuse disclosure and clinical counseling in the area of child abuse, testified to the following:

> [SAO Attorney Freeman]: What did [S.L.] tell you regarding any of the sexual abuse in Session Number 2?
>
> [Drum]: She told me that her and I don't; I can't remember. I can't; I can't quote her exactly, but she told me that her father digs her in the front and the back or the butt. I can't remember which word she used.
>
> [After having the witness's memory refreshed with her expert report]
>
> [Drum]: Okay, so she told me that; she told me that he digs her really hard and then she made like a, she pantomimed a lot, she acted things out a lot when I talked to her so she made like a motion with her hands. And then I asked her where she was referring to, where he digged her and she said in the front and in the butt. And then I asked her to show me where the front was and she pointed to her groin area.
>
> * * *
>
> [SAO Attorney Freeman]: What details did she give you?
>
> [Drum]: She told me that it happened when she was at; they were at Abuela and Tito's house and in Abuela's room and she was in the bed I think with her dad and her mom.

Finally, Lauresta Krause, a licensed clinical social worker therapist, testified to appellant's own statements during a September 2014 therapy session, stating:

> [SAO Attorney Freeman]: Okay. What did Jason Fallin tell you that caused you to file a mandatory reporting?
>
> [Krause]: He came in, and he said that he had had a dream that his daughter had spent the night at his residence, and he wasn't sure whether it was a dream or not. But in it, he had awakened with an erection, that he thought he had placed his hand in his daughter's pants, and that she had awakened. And when he apologized to his daughter, she said that, "That was okay, Daddy."
>
> [SAO Attorney Freeman]: Okay, so upon hearing this, did you try to clarify whether this was reality or just a dream?
>
> [Krause]: Yes, I did, many times before—
>
> [SAO Attorney Freeman]: And what were the responses that you were given?
>
> [Krause]: He said he was ninety percent sure it was a dream, but he wasn't sure it was a dream.

In our review of the record, including the above-mentioned evidence presented by the State, it is clear beyond a reasonable doubt that the erroneous admission of Mohler's testimony had no influence on the jury's guilty verdict. There was an abundance of other evidence that the jury could have based its verdict on. For these reasons, the circuit court's error was harmless.

II. Did the circuit court err by allowing a witness to opine, as an expert, on whether another witness showed signs of fabrication or coaching?

Appellant next argues the court erred in permitting the testimony of Meredith Drum, a licensed social worker admitted as an expert in child abuse disclosures. Drum testified, "she did not see any signs of fabrication when she interviewed S.L. and that she did not have any concerns about fabrication when she interviewed her." Appellant avers Drum's testimony "essentially [went] to the ultimate issue of the case," i.e. whether appellant

committed the alleged abuse. He contends, "if jurors hear that a witness is not fabricating, they are left with the conclusion that she is telling the truth."

He argues *Bohnert v. State* is applicable, where the Court of Appeals ruled inadmissible the expert's testimony regarding whether a child had been sexually abused. 312 Md. 266 (1988). In that case, a "Protective Services Investigator with the Department of Social Services," was admitted as an expert in the field of child abuse. *Id.* at 270–71. When asked by the State whether she had "an opinion as to whether or not this child…was sexually abused," the investigator responded:

> It's my opinion, based on the information that Alicia was able to share with me, that she was, in fact, a victim of sexual abuse.

Id. Finding that "the record leads to no other conclusion than that [her] opinion was founded only upon what [the child] said had occurred," the Court of Appeals explained that it is "settled law" in Maryland that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth." *Id.* at 278. Thus, "the opinion was inadmissible as a matter of law because it invaded the province of the jury[.]" *Id.* at 279. Appellant argues that Drum's testimony was functionally equivalent to the inadmissible testimony in *Bohnert*.

Appellee first contends that appellant's exception to the matter was unpreserved because "there was no contemporaneous objection to the testimony." Second, even if it was properly preserved, the court's ruling was consistent with *Bohnert*. They argue that Drum "did not express an opinion about S.L.'s veracity in her testimony." Instead, "consistent with the trial court's ruling," she testified, "S.L. did not show any 'signs' of

coaching or fabricating." Appellee points to *Yount v. State,* where this Court upheld the testimony of an expert child therapist regarding whether an allegedly abused child recanting an accusation was abnormal, finding that it did not address the ultimate issue. 99 Md. App. 207, 215 (1994) ("The issue of credibility is simply not the *ultimate* issue. It is not even a component part or an element of the ultimate issue."). Likewise, the State avers, Drum did not express an opinion as to the ultimate issue. Further, her opinion was not merely based on the statements of S.L., but as a result of her training regarding the signs that an abused child is fabricating or has been coached to testify in a certain manner.

In our review of the record, appellant made a continuing objection to the testimony, and thus, properly preserved the issue for our consideration.

A trial court may allow an admitted expert to make an opinion within her expertise, if she is "sufficiently familiar with the subject matter under investigation to elevate [her] opinion above the realm of conjecture and speculation[.]" *State Health Dep't v. Walker*, 238 Md. 512, 520 (1965) (internal citations omitted). When reviewing a trial court's decision regarding the admission of expert testimony, appellate courts may only reverse "if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Radman v. Harold*, 279 Md. 167, 173 (1977) (internal citations omitted).

The testimony at issue in the case at bar differs from the testimony presented in *Bohnert* for three reasons. First, the outcome in *Bohnert* depended solely on "the jury's determination of the credibility of two witnesses, the accuser and the accused." 312 Md. at 273. Unlike *Bohnert*, in which "it was clearly apparent that the State's case hinged solely

on the testimony of Alicia," the State in the case *sub judice* presented testimony of appellant's own statements to his therapist that indicated he might have abused his daughter. *See Id.* at 270.

Second, the statements made by Drum were distinguishable from the statements made by the expert witness in *Bohnert,* who opined that the child was "in fact, a victim of sexual abuse." *Id.* at 271. The *Bohnert* court ruled the opinion went to the ultimate issue in the case, that is, whether the defendant sexually abused the child. *Id.* at 278–79. The testimony in the present case contains a subtle, but crucial, difference. Drum testified:

> [SAO Attorney Freeman]: In your Session Number 2 did you see any signs of coaching or fabrication by [S.L.]?
>
> [Drum]: No.
>
> [SAO Attorney Freeman]: Was her language age appropriate?
>
> [Drum]: Yes.
>
> * * *
>
> [SAO Attorney Freeman]: When any sessions with [S.L.] and I don't mean her demeanor like her appearance, but her demeanor and her ability for attention span. How would you describe that for the jury?
>
> [Drum]: She was slightly distractible but not; I would say that she, she couldn't talk about the abuse for more than about five minutes at a time before not; either not wanting to talk about it anymore or changing subjects. But when I asked her a question she was very easily able to pay attention and respond.
>
> [SAO Attorney Freeman]: Okay. Would that type of attention span for lack of a better word right now, would that cause you alarms that that's a sign of fabrication or coaching or coercion?
>
> [Drum]: No, especially not for a six year old and especially not a six year old who's disclosing abuse.

> [SAO Attorney Freeman]: So, in Session Number 3 did you see any signs of fabrication, coaching?
>
> [Drum]: No.
>
> * * *
>
> [SAO Attorney Freeman]: Okay. Throughout your four sessions, did you have any concern that [S.L.] was fabricating?
>
> [Drum]: No.
>
> [SAO Attorney Freeman]: Did you have any concern that she was being coached?
>
> [Drum]: No.
>
> [SAO Attorney Freeman]: Did you observe any of the signs in which you were taught through your training and experience that she was being coached or this was fabricated?
>
> [Drum]: No.

As is clear from the testimony presented, Drum never stated whether S.L. was telling the truth about the abuse. She merely testified whether she observed signs of fabrication or coaching and, as a result, whether she had any concerns about S.L. fabricating or being coached.

Finally, the *Bohnert* expert admitted she had not subjected the child to "any type of objective test." *Id.* at 271. Rather, she claimed she had a "certain sense about children," so that it was "not necessary to give them tests." *Id.* Further, the witness declared she felt no need to review medical reports "in making an expert opinion as to whether or not a child has been abused." *Id.* Conversely, Drum, in the present case, applied the objective

knowledge she had gained through education, experience, and specialized training in the field of child abuse disclosure. Drum testified on direct examination:

> [SAO Attorney Freeman]: What training did you receive in the field of child abuse disclosures?
>
> [Drum]: The main training I received was in extended forensic evaluation training at the National Children's Advocacy Center.
>
> [SAO Attorney Freeman]: Okay. And what did that training involve?
>
> [Drum]: That was teaching me how to; teaching everyone how to ask questions appropriately over a period of time to children who may or may not have been abused or neglected but mostly abused.

As such, the rulings of the court were consistent with the dictates of *Bohnert*. The expert witness did not express an opinion regarding the ultimate issue in the case. Nor did her testimony invade the province of the jury. For these reasons, we find the circuit court did not err in admitting the expert testimony of Drum.

III. Did the circuit court err by refusing to give a requested instruction that would have informed jurors that the credibility of another witness is not a proper subject of expert testimony?

Appellant requested the jury instruction in question after this exchange during the re-direct examination of Meredith Drum:

> [SAO Attorney Freeman]: And is there any indication in your sessions with her that when she was disclosing her father as the person who was digging her that she was incorrect?
>
> [Drum]: No.

Appellant's counsel requested that the court give the following curative instructions:

> It is for the jury alone to assess whether a witness or an alleged victim is telling the truth.

> It is not an appropriate subject for expert testimony to tell you whether or not they believe someone's telling the truth.

The State took no issue with the first part of the requested instruction; however, opposed the second part, claiming it is inconsistent with *Yount v. State*, 99 Md. App. 207 (1994). The court agreed with the State, instructing the jury:

> Just as a reminder it is for you alone to determine the credibility of any witness.

Appellant now argues the court committed reversible error because the requested instruction was "an accurate statement of law" that reflects the principles laid out in *Bohnert*, i.e., "testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law." 312 Md. at 278. Appellee avers this contention is not only unpreserved, but also meritless.

On appeal, instructions are "reviewed in their entirety to determine if reversal is required." *Fleming v. State*, 373 Md. 426, 433 (2003). We review the trial court's decision "under an abuse of discretion standard." *Johnson v. State,* 223 Md. App. 128, 138 (2015) (internal citations omitted). If the instructions "correctly state the law, are not misleading, and cover adequately the issues raised by the evidence," then the defendant has "not been prejudiced and reversal is inappropriate." 373 Md. at 433.

A review of the record shows that appellant's objection was preserved and further that the court twice instructed the jury that they "are the sole judge of whether a witness should be believed." The court also instructed the jury:

> You should consider an expert's opinions together with all the other evidence.

> In weighing the opinion of an expert in addition to the factors that are relevant to any expert's credibility you should consider the expert's knowledge, skill, experience, training or education as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion.
>
> You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion.

Appellant contends the second part of his requested instruction, which would have instructed the jury "it is not an appropriate subject for expert testimony to tell you whether or not they believe someone's telling the truth," is legally accurate considering the *Bohnert* opinion. However, appellant fails to consider this Court's ruling in *Yount*, which clarifies and narrows the *Bohnert* decision. In *Yount*, this Court determined an expert child therapist could testify as to whether it was normal for an abused child to falsely recant his or her allegation. 99 Md. App. 207. We found the "psychological phenomenon of wavering or vacillating on the part of a sexual child abuse victim…is not part of the common currency of lay experience," thus could be "of appreciable help to the fact finder." *Id.* at 211–12. The expert's testimony did not address the ultimate issue, rather, it properly considered the credibility of a witness. *Id.* at 214–15. Thus we affirmed the trial court's decision to allow her to testify "as to a phenomenon that had a bearing on an assessment of the witness's credibility." *Id.* Therefore, it is clear that in certain scenarios, an expert witness may testify as to whether they believe one is fabricating or not.

As a result, the instructions given by the court reflected accurate legal principles, properly outlined the jury's responsibilities, and did not constitute an abuse of discretion. The court's failure to include appellant's requested instruction was not error in light of the entirety of the instructions given.

IV. Did the circuit court err by allowing the prosecutor to argue facts not in evidence on a key issue in rebuttal closing argument?

Generally, attorneys are "afforded a wide range" to "discuss the evidence and all reasonable and legitimate inferences" during closing arguments. *Washington v. State,* 180 Md. App. 458, 472 (2008). However, they "should not be permitted by the court, over proper objection, to state and comment upon facts not in evidence or to state what he could have proven." *Id.* at 473 (internal citations omitted). On appeal, "reversal is only required when it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Lawson v. State*, 389 Md. 570, 592 (2005) (internal citations and quotations omitted).

It is undisputed that the State mistakenly stated that Heather L. testified she was not a light sleeper. In fact, she testified:

> [OPD Attorney Heldreth]: Okay…um…and you would say, actually, that you are a light sleeper?
>
> [Heather L.]: Yes.

Yet, during the State's rebuttal closing argument, the following occurred:

> [SAO Attorney Freeman]: Then this is just a small point but Heather didn't testify she was a light sleeper. In fact she said she wasn't.
>
> And the reason why I say that is because you only heard this name twice this whole entire trial, it was a one minute period, the name Sharon and I think it's pronounced Whittenfeld or Whittenfold or something like that.
>
> And the reason why is because when Heather said she wasn't a light sleeper, no I wouldn't say I was a light sleeper Ms. Heldreth said.

Appellant timely objected and, after a sidebar, the court overruled his objection. The State continued:

> [SAO Attorney Freeman]: So, she said well do you remember talking to Sharon Whittenfeld? Okay, maybe; yeah.
>
> Well didn't you tell Sharon Whittenfeld that you were a light sleeper? No and that was it. On we went to another question.
>
> So, but Ms. Heldreth wants to argue here that she said she was a light sleeper so therefore she would have woken if Jason had, the father [S.L's] father, had really touched her privates in the bed like [S.L.] said.
>
> And those are the nu--; they may sound like a nuance, but those are the nuances, the memories that you're gonna have to rectify on your own.
>
> If that's the only time Sharon Whittenfeld's name was mentioned. You didn't hear from her, she didn't testify but that's when it was mentioned and Heather's response was no, I didn't tell her that.
>
> And then we moved on.
>
> But since that happened two days ago just like many other points in Ms. Heldreth's argument the Defense is banking that you forget these nuances, that you don't remember exactly what the witnesses said, that you don't remember when they stood up for themselves, that you don't remember when [S.L.] told about (unintelligible) several times cause she didn't remember.

Appellant now contends this "severely prejudiced Mr. Fallin by potentially misleading jurors on a key piece of evidence in the case." The fact that Heather L. is a light sleeper "cast[s] doubt on S.L.'s story that they were all in bed together and that she screamed when she was touched." He claims the prosecutor's "mischaracterization of the evidence, and continued argument about how defense counsel had been incorrect, had a high potential to mislead jurors."

Appellee argues that reversal is not required because the issue of whether Ms. L was a light sleeper was inconsequential to the jury's verdict. They contest "regardless of whether Ms. L was a light sleeper or a heavy sleeper, she would have heard S.L., who was

lying right next to her, screaming." Additionally, appellee suggests that S.L. may not have screamed at all during the 2012 incident, pointing out that S.L. only mentioned screaming on one occasion. S.L. did not report having screamed when she made disclosures to her grandmother or Mohler. Finally, the State avers that the jury was twice instructed by the court not to consider opening statements and closing arguments as evidence.

To determine whether improper comments influenced the verdict, we consider "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Donaldson v. State*, 416 Md. 467, 497 (2010) (internal citations omitted). In making such an analysis, we first note that the prosecutor's improper comment that Heather L. was not a light sleeper could indeed suggest that she slept through the 2012 incident, in which S.L. claimed she screamed after being sexually assaulted by her father. However, this remark did not severely prejudice appellant, especially in light of the fact that the issue of whether S.L. screamed after the 2012 incident was already in dispute. The prosecution themselves had admitted contradictory evidence on whether S.L. screamed.

Further, while the court took no measures to cure potential prejudice about the improper comment immediately afterwards, the court had already instructed the jury regarding witness credibility and that closing arguments are not evidence, stating:

> Opening statements and closing arguments of lawyers are not evidence. They are intended only to help you to understand the evidence and to apply the law.
>
> Therefore if your memory of the evidence differs from anything the lawyers or I may say you must rely on your own memory of the evidence.

In context, the remarks of the prosecutor were isolated, the court's instructions regarding witness credibility and closing arguments were comprehensive, and the weight of the evidence against appellant was substantial. Viewing the instructions as a whole and in light of that evidence, the isolated remarks of the prosecutor did not mislead or influence the jury to the prejudice of appellant.

V. Did the circuit court err by admitting irrelevant evidence of appellant's failure to report himself to Child Protective Services?

Maryland Rule 5-401 defines "relevant evidence" as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In determining whether evidence is relevant, trial courts generally have "wide discretion." *State v. Simms*, 420 Md. 705, 724 (2011) (internal citations omitted). On review, we must consider first, "whether the evidence is legally relevant," and if relevant, then "whether the evidence is inadmissible because its probative value is outweighed by a danger of unfair prejudice[.]" *Id.* at 725 (internal citations omitted).

Appellant objected to the testimony of his therapist, Lauresta Krause, who stated that he told her about having a dream in which he sexually assaulted S.L. Krause testified appellant told her he was uncertain whether it was a dream or real life. She then engaged in the following exchange, with appellant:

> [SAO Attorney Freeman]: What was the plan of action?
>
> [Krause]: The plan of action was that he wanted to get ahold of his mother and their attorney, and that they would make the call to CPS. If they did not, and if they didn't get in touch with me letting me know that that would be done, then I would be the one to turn in the report to CPS, which I did.

> [SAO Attorney Freeman]: Okay, before you turned in the report to CPS, did you make any attempt to find out whether Jason Fallin or his mother made the report to CPS?
>
> [Krause]: Yes.
>
> [SAO Attorney Freeman]: Okay, and what was the response then? And just for the record, are you referring to your notes?
>
> [Krause]: Yes, I am…I tried to call, and even tried to call the mother, to update her as well.
>
> [SAO Attorney Freeman]: Okay, and did you get any response?
>
> [Krause]: No.

Appellant maintains the "fact that (he) was given the option to report himself to CPS, and that Krause was unable to confirm whether he had so, was irrelevant." Additionally, he points to *Weitzel v. State*, in which the Court of Appeals held that pre-arrest silence in the presence of police officers is not relevant as substantive evidence of consciousness of guilt. 384 Md. 451, 461 (2004). Appellant asserts the reasoning in *Weitzel* should be extended to the case at bar. Conversely, appellee argues the testimony in question is clearly relevant; "a reasonable jury could infer that Fallin avoided taking responsibility and contacting CPS because he knew he was guilty."

In *Weitzel*, police responded to a 911 call and found Darla Effland "lying unconscious and severely injured at the bottom of a public stairwell," as well as an eyewitness and the defendant. *Id.* at 453. While in front of the defendant, the witness told law enforcement the defendant was the one who threw Effland down the stairs. *Id.* The defendant remained silent. *Id.* Then, as the officer advised the defendant he was under

arrest, the defendant made no comment. *Id.* at 454. At trial, the State was allowed to introduce the defendant's "pre-arrest" silence as substantive evidence of his consciousness of guilt. *Id.* On review, the Court of Appeals found such "evidence is too ambiguous to be probative when the 'pre-arrest' silence is in the presence of a police officer." *Id.* at 456. They found "the average citizen is almost certainly aware that any words spoken in police presence are uttered at one's peril." *Id.* at 461. While "silence in the presence of an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation, a defendant's reticence in police presence is ambiguous at best." *Id.*

It is clear that the present case is distinguishable. First, the present case did not involve law enforcement or state action, rather the statements of appellant's therapist. We liken the therapist in this situation to an "accuser" or "non-threatening bystander" as referenced in *Weitzel*. Second, Krause did not attest to appellant's silence, but rather his failure to comply with an agreed-upon course of action.

Krause's testimony was, therefore, relevant. Her testimony had a tendency to make it more probable that appellant avoided responsibility and had something to hide from CPS, facts that were clearly "of consequence to the determination of the action." While it was prejudicial, it was not unfairly prejudicial. The testimony's probative value outweighed any prejudicial effect. For these reasons, we find the circuit court did not err in admitting Krause's testimony in this regard.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.