UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2305

September Term, 2007

VICTORIANO BENITEZ

v.

STATE OF MARYLAND

Davis,
Woodward,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: December 14, 2009

Appellant, Victoriano Benitez, was indicted by a grand jury in the Circuit Court for Montgomery County, Maryland, and charged with child sexual abuse, two counts of rape in the second degree, and four counts of sexual offense in the third degree of Yesenia, a minor child.[1] Appellant's first trial on these charges ended in a hung jury. Appellant was then retried and convicted by a jury of child sexual abuse, two counts of second degree rape, and four counts of sexual offense in the third degree. Appellant was thereafter sentenced to 15 years for child sexual abuse, 20 years consecutive for one count of second degree rape, another 20 years consecutive, with all but ten years suspended, for the second count of second degree rape, and four consecutive sentences of 10 years for sexual offense in the third degree, all suspended.

On appeal, appellant presents four questions for our review, which, in the words of his brief, are:

> I. Did the trial court err in permitting the prosecutor, on cross examination of [appellant], to inquire about privileged communications between [appellant] and his counsel?
>
> II. Did the trial court err in preventing [appellant] from probing [Yesenia's] allegations of inappropriate touching by others?
>
> III. Did the trial court err in curtailing evidence concerning parties that [Yesenia] was exposed to when she was with her mother, Gina Corral?

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[1] Due to the nature of the case, the victim and certain witnesses will only be referred to by their first name. We will use the spelling of the victim's name provided in the trial transcript. Additionally, the indictment originally charged appellant with sexual abuse of both Yesenia and Jasmine. However, prior to the first trial, the charges were severed. This case only concerns the charges with respect to Yesenia.

IV. Did the trial court err in admitting an audio recording of the prior testimony of a key State's witness?

V. Did the trial court err in its conduct of *voir dire*?

For the following reasons, we shall affirm the judgments of the circuit court.

BACKGROUND

The victim in this case, Yesenia, is the oldest daughter of Juan O. and Gina Corral. On October 25, 1996, after her parents separated, then six-year-old Yesenia, her sister, Jasmine, and her father moved in with her paternal grandmother, Anna Galan, and appellant, Anna Galan's husband. The family lived in Galan's three-story house located on Bushey Drive in Silver Spring, Maryland, from October 1996 until May 1999.

Appellant and Galan lived on the top floor, and Yesenia, Jasmine, and their father lived in a bedroom on the main floor. Additionally, Yesenia's great-grandmother, Bertha Zepeda, and Yesenia's half-sister, Jessica, lived in the house on the same floor as Yesenia. Yesenia's aunt, Karol Rodriguez, Rodriguez's children, and, at times, Rodriguez's boyfriend, Tink Ward, lived in the basement. Yesenia also testified that her uncle, Marco Rodriguez, would stay in the basement at times.

During this time frame, Juan O. worked as a long distance truck driver and was frequently on the road. Juan O. explained that he worked away from home for two to three weeks at a time, and that, when he was home, he would only be there for a day or so, or at most, a week to a week and a half.

While Yesenia's father was away, the remainder of the family would watch over

Yesenia and Jasmine. However, according to Yesenia, other than at mealtime, the family did not spend much time together. Yesenia's grandmother, Galan, worked from 2:00 p.m. to 11:00 p.m. as the supervisor of a maintenance company. Yesenia's great-grandmother spent much of her time in her room, cooking in the kitchen, or at a local senior center. Yesenia did not see much of her aunt, Rodriguez, because Rodriguez spent most of her time in the basement with her own children.

As for appellant, although he worked some evenings, appellant primarily worked during the daytime at the same maintenance company as Galan. According to Juan O., appellant therefore became the primary person responsible for watching his children. Yesenia also confirmed that appellant was home more often than her grandmother, Galan.

Sometime after Yesenia, Jasmine, and her father moved into Galan's home, around the time Yesenia was seven or eight-years-old, Yesenia testified that appellant began to touch her vagina with his hand and his penis, perhaps as many as twenty different times. One of the times, appellant had Yesenia sit on his lap, facing away from him, and told her to take off her shorts. Appellant then took his pants down, and rubbed his penis against Yesenia's vagina and her butt.

Appellant also did the same thing on other occasions in the kitchen and in the hallway near the kitchen. Yesenia testified that while she was sitting on top of him in a chair in the kitchen, appellant touched her vagina with his penis and "one time he actually did try to put it in." Appellant also touched Yesenia's vagina with his hand while this occurred. Yesenia

also testified that appellant made her touch his penis with her hands on a number of occasions.

A couple of times, appellant told Yesenia not to tell her father, Juan O. Appellant said that, if she told, something would happen to Juan O. Yesenia testified that she believed something would happen to Juan O. if she said anything. Yesenia did not tell anyone in the house, and did not think anyone saw when these incidents occurred.

Defense counsel claimed that these allegations were made in the midst of a custody dispute between Yesenia's parents, but when the prosecutor asked Yesenia whether her mother ever told her to say that appellant molested her, Yesenia testified that her mother never told her what to say. Yesenia also maintained that no one molested her when she stayed with her mother on overnight visits, and that appellant was the only person who molested her.

Over defense counsel's objection, the court admitted an audiotape of Jasmine's testimony from appellant's first trial, because she was an unavailable witness. Jasmine testified that, on one occasion, while Jasmine was in the bedroom she shared with Yesenia, Jasmine saw appellant touch Yesenia. Jasmine testified that "he had like his hand on her leg. And then like put it in her pants." Jasmine closed her eyes, and heard her sister crying.

Refreshing her recollection from a statement she gave to police, Jasmine clarified that appellant touched Yesenia's skin "in that area," and that he "rubbed one hand like first and put his hands down her pants." Jasmine saw Yesenia close her eyes and start crying. While

this was happening in the bedroom, appellant told Jasmine to sit down and watch. Jasmine also testified that appellant told Yesenia "not to tell my dad."

On some other occasion, Jasmine saw Yesenia and appellant in a bathroom and that, when Yesenia came out, she looked "[s]cared. Like worried." Yesenia told Jasmine that appellant touched her. Yesenia also told Jasmine about other incidents when they were about to go to sleep and that "[s]ometimes she would tell [Jasmine] every night, but [Jasmine did not] remember exactly how many times it happened."

There was a substantial amount of testimony at trial concerning when Yesenia's allegations of sexual abuse by appellant were reported to her family and the authorities. During the initial months after Yesenia, Jasmine, and Juan O. moved into Galan's home, Yesenia did not know where her mother, Corral, was living. Corral testified that she did not see her children for six months after the separation from Juan O., but Yesenia and Juan O. actually believed it was closer to a year or more. After Corral did start seeing her children again, Yesenia and Jasmine would stay with Corral overnight on weekends with her Corral's relatives, including their Aunt Yadira Corral ("Yadira"), their Aunt Gladys Merac, and their other grandmother, Dina Vega.

On one such occasion, Yesenia told her grandmother that appellant touched her vagina.[2] This conversation happened while her grandmother was bathing her and her sister.

[2] The grandmother to which Yesenia refers is related to Yesenia through Corral, and the record indicates that she was Yesenia's great-grandmother. The record is unclear if grandma Vega is actually Yesenia's great-grandmother.

After being told that no one is supposed to touch her "down there," Yesenia replied, "Poppy Victor does," referring to appellant. Yesenia repeated this information to her aunt, Merac, as well. Merac testified at trial and confirmed that Yesenia told her that her father's stepfather was "molesting me," touching her private parts, and trying to put his penis in her private part.

Yesenia eventually told Corral about the incidents with appellant, including that appellant was touching her private parts. According to Yesenia, Corral never wanted to go into the details, but only wanted to know if her allegations were true. Corral confirmed that she did not tell Yesenia to say that appellant touched her, and Yesenia never told her that anyone else touched her.

Corral then testified that she told Juan O. that the girls were being abused and suggested that he should not let the girls go back to the house on Bushey Drive. However, Juan O. testified that Corral only hinted that something had happened to Yesenia at Bushey Drive. According to Juan O., Corral never provided any details, other than to say that Yesenia was being abused, and Juan O. did not want to believe anything happened. Corral also testified that she never reported Yesenia's allegations to police because she was wanted by the authorities and was scared that she would be incarcerated.[3]

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[3] Eventually, Corral turned herself in to the police. While she was incarcerated, around July 1999, she was served with divorce papers. Corral maintained that, although she and Juan O. argued about visitation rights, she never fought Juan O. for custody of Yesenia and Jasmine. Corral maintained that, even though she would have liked the girls to live with her, she did not take any action because of her circumstances, including the fact that she was

According to Juan O., appellant left Galan and moved out of the Bushey Drive home in approximately January or February 1999. Juan O. testified that he had no idea where appellant went at this time.

Shortly thereafter, approximately May 1999, Yesenia, Jasmine and Juan O. also moved out of the Bushey Drive home, and went to live with Leslie Fondino, Juan O.'s then-girlfriend, and Fondino's daughter in Gaithersburg, Maryland.

Apparently in August 1999, when she was about nine-years-old, Yesenia finally told Juan O. about these incidents with appellant. Juan O. testified that Yesenia told him that appellant touched her on top of her clothes, and then progressed to "touch her private parts and he would put his penis on her private parts and he would force her to touch him" on his penis. Yesenia told Juan O. that this happened "a lot" and that it occurred when Juan O. was away. Juan O. also testified that Yesenia said she did not tell him earlier because appellant had threatened to hurt or kill him.

Juan O. confirmed that Yesenia never told him that anyone other than appellant abused her. Juan O. also testified on cross-examination that this included asking Yesenia if Corral's boyfriend, Wilfredo Burgos, abused Yesenia.

After informing other family members about Yesenia's allegations, Juan O. took Yesenia to social services, and social services contacted the police. Yesenia spoke to several

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wanted by police and about to have another baby. In fact, Corral and Juan O. both confirmed that she and Juan O. agreed to visitation, that Corral never had any problems seeing Yesenia and Jasmine on a regular basis, and that Corral did not want custody.

people about the sexual abuse she suffered, including Elizabeth Ann Hoffman from the Montgomery County Child Protective Services, who was an expert in forensic interviewing and child sexual abuse.

Hoffman was assigned this case on August 19, 1999, and subsequently interviewed Yesenia on September 21, 1999. During the course of that interview, Yesenia told Hoffman that appellant would direct her to remove her pants and her underwear, and that he would touch and rub her vaginal area. Additionally, appellant digitally penetrated her. Appellant would attempt to have Yesenia touch his penis and would rub his penis against her vagina. Yesenia told Hoffman this happened a few times. Yesenia never identified anyone other than appellant to Hoffman as the person who abused her.

Yesenia also spoke with Dr. Leslie Mitchell, an expert in emergency pediatric medicine as well as pediatric sex abuse examinations. Dr. Mitchell examined nine-year-old Yesenia on September 24, 1999. During an interview with Dr. Mitchell, Yesenia informed her that appellant touched her "in my private parts and parts he was not supposed to touch." Yesenia was shown anatomically correct dolls and demonstrated where on her person appellant touched her. Dr. Mitchell testified that Yesenia indicated that appellant touched her on the vulva part of the doll. Yesenia also told Dr. Mitchell that appellant "would put his finger inside of me." [T3. 113] Yesenia also identified her vaginal area as her "tush" and informed Dr. Mitchell that appellant would place his penis on her "tush" and would rub it up and down, and also that he placed it inside her "tush." Further, Yesenia demonstrated that

appellant would take her hand and place it on his penis.

Dr. Mitchell then conducted a physical examination of Yesenia, including her genital areas. Dr. Mitchell discussed in detail the injuries that she observed, which included evidence of penetrating trauma, an abnormal or attenuated hymen, and tears in the hymen that had healed over with a scar. Dr. Mitchell concluded, based on a reasonable degree of medical certainty, and considering her physical observations and her interview with Yesenia, that these injuries were consistent with repeated events of sexual abuse. Further, based on the nature of the injuries, Dr. Mitchell testified that "they were all healed so the healing period we usually say can take 72 hours." Dr. Mitchell stated that the physical injuries could have occurred years before.

Appellant was eventually arrested in Washington, D.C. on August 14, 2006. When this case came to trial, appellant testified on his own behalf and denied that he ever attempted to place his penis on Yesenia's vagina or on her anal area. Appellant denied that he placed Yesenia's hand on his penis. He further denied that he ever touched her in any sexual manner whatsoever.

Additional facts will be set forth as needed for the resolution of the issues presented in this appeal.

DISCUSSION

I.

Did the trial court err in permitting the prosecutor, on cross examination of [appellant], to inquire about privileged communications between [appellant] and his counsel?

During direct examination, the following colloquy took place between appellant and defense counsel:

> [DEFENSE COUNSEL]: You heard Yesenia testify that you tried to place your penis on her vagina. Did you commit that crime?
>
> [APPELLANT]: I swear by God, before God that I've never committed that crime.
>
> [DEFENSE COUNSEL]: You heard Yesenia say that you tried to put your penis on her anal area. Did you commit that crime?
>
> [APPELLANT]: It's a lie. It's a lie. I've never done that. Never, never. I always loved them like my own children, my own daughters.
>
> [DEFENSE COUNSEL]: You heard Yesenia testify that you took her hand or hands and put them on your penis. Did you commit that crime?
>
> [APPELLANT]: No. No. I swear by my mother.
>
> [DEFENSE COUNSEL]: Did you ever touch Yesenia in any way in a sexual manner?

[APPELLANT]: No, never, never, never.

[DEFENSE COUNSEL]: Sir, how did these allegations make you feel?

[APPELLANT]: Really bad, because of so many lies, so many lies, and losing so much time for everyone.

On cross-examination, appellant answered questions about his relationship to Galan, his work history, his relationship to the individuals that lived in the Bushey Drive home, the hours he worked, and the hours he spent at home while living at Bushey Drive. Appellant was also questioned about Yesenia, and admitted that he helped take care of both Yesenia and Jasmine, but denied that he was ever alone with Yesenia.

Toward the end of cross-examination, the following colloquy occurred:

[PROSECUTOR]: Now, sir, you've had a number of occasions to – you've met with your attorney on a number of occasions and discussed your potential testimony, haven't you?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[APPELLANT]: That I talked to my lawyer?

[DEFENSE COUNSEL]: Objection, Your Honor.

[APPELLANT]: Yes, he's my lawyer.

[PROSECUTOR]: And you've discussed exactly what questions he's going to ask you.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: You knew what questions you were going to be asked.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: You've practiced your testimony.

[DEFENSE COUNSEL]: Objection.

THE COURT: Approach, counsel.

At the bench, the trial court asked defense counsel why the questions were improper, stating: "[s]he's not asking him the substance of any advice of counsel or what he was going to say, just whether he prepared or practiced his testimony." Appellant's trial counsel objected on the grounds that the question invaded the attorney-client privilege. The trial court disagreed, stating "[s]he's not going to ask him what his attorney said. That's improper, and I'm sure she's not going to ask that question." The bench conference concluded and the following then transpired:

[PROSECUTOR]: You practiced your testimony.

[DEFENSE COUNSEL]: Same objection.

THE COURT: Overruled.

[APPELLANT]: I, I don't practice, practicing to tell the truth. I don't practice like you have done with your client. I always say the truth.

[PROSECUTOR]: Now, sir, you have previously testified at a previous hearing under oath, correct?

[APPELLANT]: Yes.

[PROSECUTOR]; And aren't the questions that you were asked today, they're identical to what you were asked previously?

[DEFENSE COUNSEL]: Objection.

THE COURT: If he knows. Overruled.

[APPELLANT]: Yes.

[PROSECUTOR]: And your answers are identical.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[APPELLANT]: Should I answer? I don't practice telling the truth. The truth is what I say, and I don't need to practice.

[PROSECUTOR]: But isn't it true, sir, when you were asked whether Yesenia took her hand and put it on your penis, if you committed that crime, your response was, "No, sir, it's not true, I swear on my mother's memory"?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[APPELLANT]: And I continue swearing that because (unintelligible) inventing all those people, I swear it, I swear it because it's not true, it's not true.

[PROSECUTOR]: And isn't it true, sir, when you were asked whether you put your penis inside of her vagina, whether you committed that crime, you responded, "I swear it by God, I have never done that, it's a lie"?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[APPELLANT]: Of course. Of course, I'm going to deny it, because it's a lie, it's a lie. I even, it hurts me, and I even go crazy because it's a lie. It makes me crazy. They're pure lies.

[PROSECUTOR]: Thank you, sir.

(Emphasis added).

Appellant contends that the trial court erred by permitting the prosecutor to cross-examine him about communications between him and his attorney. Appellant, citing *Blanks v. State*, 406 Md. 526 (2008), argues that these questions violated the attorney-client privilege, because the questions sought to elicit testimony regarding whether appellant and his attorney discussed his testimony before trial. Appellant thus concludes that the questions undermined his "credibility by the improper means of invading his attorney client privilege."

The Court of Appeals recently discussed the protection afforded by the attorney-client

privilege in *Blanks*, stating:

> The privilege protects "confidential communications, but not the underlying factual information." The privilege is recognized as "'an accommodation of competing public interests'" favoring "'protection from unauthorized disclosure of communications between an attorney and his client over the general testimonial duty and compulsion in the interest of truth and justice.'" The privilege, "'basic to a relation of trust and confidence,'" is not itself grounded in the Constitution; nevertheless, it is "'essentially interrelated with the specific constitutional guaranties of the individual's right to counsel and immunity from self-incrimination.'"
>
> The privilege protects, not merely the contents of communications between a client and counsel, but the fact that communications did or did not take place. The privilege also protects the timing of such communications.

Id. at 539.

In that case, Blanks was charged with the murder of Tyshika Askins, a friend of his girlfriend, Lisa Pinder. *Id.* at 530. The State presented considerable evidence in support of its theory that Blanks went to Askins's apartment to look for Pinder, and that, in the course of an argument, Blanks killed Askins. *Id.* Ultimately, Blanks's fingerprints were found on an orange juice container in Askins's apartment, and his DNA was found underneath her fingernails and on her t-shirt. *Id.* at 531. When Blanks was initially interviewed by police, he informed them that he believed Askins was a friend of his girlfriend, but that he had never been to her apartment. *Id.*

At trial, Blanks testified on his own behalf and claimed that he, in fact, had a romantic relationship with Askins. *Id.* at 531-32. Blanks also testified that, on the same day Askins

was murdered, he went to Askins's apartment and he and Askins engaged in oral sex, but not intercourse. *Id.* at 532. During that encounter, Blanks admitted that he touched her neck, breasts, stomach, and back. *Id.* Afterwards, Blanks poured himself a glass of orange juice from the container and then left Askins's apartment. *Id.* Blanks also acknowledged during his direct examination that he did not reveal the alleged affair with Askins to anyone, other than his father, nor did he tell anyone that he had been in Askins's apartment on the day of the murder, because he did not want his girlfriend to learn about it. *Id.*

Immediately following Blanks's direct examination, the prosecutor, over objection, "probed whether and when [Blanks] had discussed his testimony with defense counsel." *Id.* at 533. The prosecutor then followed with several questions asking about whether Blanks and his attorney had previously discussed his testimony, particularly, inquiring if defense counsel had discussed the areas on which defense counsel would focus his questioning. *Id.* Defense counsel objected and requested a bench conference and, arguing to the trial court that, while he thought one of the prosecutor's questions was generally "appropriate," if the questioning continued it would inevitably intrude "into privileged communications." *Id.* The court overruled the objection and permitted the prosecutor to continue with cross examination. *Id.* at 533-34.

The prosecutor then proceeded to ask Blanks the following questions:

> [Prosecutor]: Okay. Let me ask you again. So basically today is the first time that you've gone into detail or said much about --
>
> [Defense Counsel]: Objection, Your Honor.

[The Court]: It's noted and overruled.

[Prosecutor]: -- what you've testified to today, right?

[(Blanks)]: You mean have I went into detail with my attorney?

[Prosecutor]: Yes. You just said you only talked to him briefly so today would be the first time you've really gone into detail about what happened, right?

[(Blanks)]: We talked about the case.

[Prosecutor]: The question was you said you'd only talked to him briefly about what you just said here today?

[(Blanks)]: You said did we went (sic) over the testimony, we only went over it briefly last night, like ten minutes.

[Prosecutor]: Okay. So this would be the first time you've really given him the full story was here today; is that right?

[Defense Counsel]: Objection, Your Honor.

[The Court]: I sustain that.

Id. at 535-36.

The Court of Appeals held that "the prosecutor sought to expose when and what petitioner had discussed with his attorney about his relationship with the murder victim," *id.* at 541, and thus the questions invaded the attorney-client privilege. *Id.* at 544.

Unlike *Blanks*, in the case *sub judice*, the prosecutor's questioning did not seek to elicit testimony regarding the content and timing of appellant's discussion with his attorney. Rather, the prosecutor sought to demonstrate that appellant was now offering virtually identical testimony as that offered at "a previous hearing under oath."

For example, during direct examination, when appellant was asked whether he placed his penis on Yesenia's vagina, he answered, "I swear by God, before God that I've never committed that crime." During cross-examination, the prosecutor asked appellant if, when he was asked a similar question at the prior hearing under oath, he responded "I swear it by God, I have never done that, it's a lie." Additionally, when appellant was asked on direct examination if he put Yesenia's hand on his penis, appellant answered, "No. No. I swear by my mother." The prosecutor then asked appellant on cross-examination whether his answer to this same question was "No, sir, it's not true, I swear on my mother's memory."

The question, whether appellant had discussed his testimony with his attorney, as well as the question asking whether he practiced his testimony, preceded a series of questions tending to show that the wording of appellant's answers to certain questions were substantially identical to that in a prior hearing under oath. It was not improper for the prosecutor to suggest that appellant's testimony was practiced or memorized. The trial court thus did not err or abuse its discretion in permitting the questions and ruling that the prosecutor did not violate the attorney-client privilege.

Even if the prosecutor violated the attorney-client privilege, such error was harmless. In *Blanks*, the Court of Appeals stated that, "the State, as the 'beneficiary of such error,' must 'demonstrate, beyond a reasonable doubt, that the error did not contribute to the verdict – and is thus truly 'harmless'[.]" *Id.* at 542 (alteration in original) (quoting *Dorsey v. State*, 276 Md. 638, 658 (1976)). Reviewing the questioning for harmless error in *Blanks*, the Court of

Appeals emphasized the "[t]he strength of the State's case," noting the DNA and fingerprint evidence as well as testimony offered to counter Blanks's alibi. *Id.* at 543. The Court stated:

> Key to the success of that defense was the credibility of [Blanks's] testimony about the affair itself, as well as his testimony concerning why he told only his father of the affair and did not reveal it, or his connection to the victim's apartment, to the police.
>
> The prosecutor's cross-examination implied that petitioner had not revealed this crucial information to his lawyer, and it had the obvious purpose of undermining petitioner's credibility. In the words of [Blanks], **"the entire thrust of the cross-examination was that [Blanks's] testimony should be disbelieved because if it had been true, it would have been disclosed to counsel."**

Id. at 543-44 (emphasis added). Therefore, the Court held that "the State undermined petitioner's credibility by the improper means of invading his attorney-client privilege," and that such error was not harmless. *Id.* at 544.

In the instant case, only one of the prosecutor's questions that appellant answered, asked about an attorney-client discussion on "potential testimony." Appellant interpreted the question as asking him if he "talked to [his] lawyer" and answered the question in the affirmative, revealing only obvious information. The other two questions that asked appellant if he had previously discussed with his attorney "exactly what questions" defense counsel planned to ask, and if appellant "knew what questions . . . were going to be asked," were sustained. No other question posed by the prosecutor touched on a discussion between appellant and his attorney.

Furthermore, the questions came at the end of an extensive cross-examination on other

matters, and the gist of the questioning was not aimed at eliciting the substance of any communications between appellant and his attorney. The purpose was simply to establish that appellant had either practiced or memorized his testimony and was clearly not the overall theme or theory of the prosecution's case. The case was primarily supported by Yesenia's direct testimony about the sexual assaults, Jasmine's former testimony that she saw appellant on one occasion place his hand on Yesenia's skin "in that area" and put his hands down her pants, as well as the medical testimony tending to establish that Yesenia repeatedly sustained sexual abuse at the hands of appellant. Accordingly, we conclude that any error in permitting the questioning complained of on cross-examination was harmless beyond a reasonable doubt.

II.

Did the trial court err in preventing [appellant] from probing [Yesenia's] allegations of inappropriate touching by others?

During trial, Yesenia maintained that the only person who had molested her was appellant. When asked, during cross-examination: "Isn't it true that you told Jessica one time, 'the person who touched me was mom's friend?," Yesenia denied making that statement to Jessica and also denied that one of her mom's friends had touched her. The defense called Jessica as a witness, and she testified on direct examination:

> [DEFENSE COUNSEL]: Okay. Do you remember a time when you were living at Manchester Towers [(the complex where Yesenia and Jessica lived prior to Bushey

Drive)] when you were speaking alone with Yesenia?

[JESSICA]: Uh-huh.

[DEFENSE COUNSEL]: And Yesenia said something to you about whether somebody had touched her?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL]: May we approach?

THE COURT: Sure.

(Bench conference follows:)

* * *

[DEFENSE COUNSEL]: Your Honor, the proffer is now she's told me the same thing face-to-face, and that is that she's going to say –

THE COURT: Well, you can't lead her.

[PROSECUTOR]: Your Honor, and I would move to preclude that. This is Manchester Towers before –

THE COURT: Before the incidents.

[PROSECUTOR]: – yes, before the time frame ever even alleged in the indictment.

* * *

And this is when Yesenia would have been 6 years old.

THE COURT: – and Manchester [Towers] was way before that. So, you got a timing problem.

* * *

[DEFENSE COUNSEL]: Your Honor, I'd like to proffer what she's going to say. "When I was alone with Yesenia at Manchester Towers, it was by a trash can, Yesenia told me that one of Mommy's friends touched me." And she would say that the way that she understood it was clearly one connotation only, touched in a sexual manner.

* * *

Okay. This is almost the same proffer. I didn't have the Manchester Towers part from February, but I got that yesterday, and that's what she's going to say. I think it's extremely, highly relevant.

THE COURT: Why?

[DEFENSE COUNSEL]: It is at the center of my case for at least –

THE COURT: Before the incident that [appellant is] charged with?

[DEFENSE COUNSEL]: Yes, Your Honor. Number one, there is –

[PROSECUTOR]: The indictment starts in October of '96 –

[DEFENSE COUNSEL]: Go ahead. Go ahead. Go ahead.

[PROSECUTOR]: – of January of '97. Excuse me.

[DEFENSE COUNSEL]: Dr. Mitchell said there is no way to date the abuse that has healed. It just is something that occurred 72 hours prior to the exam. The jury has that this child's been clearly abused. Then the second step is they have an allegation from the child that my client did it. Our contention is that this injury that Dr. Mitchell testified to is the result of somebody else, besides my client.

THE COURT: The only problem with that —

* * *

– (unintelligible) nothing this witness [(Jessica)] has to say corroborates that. I mean what's to preclude you from going back to '92? I mean you can't do that. I mean this indictment alleges incidents that occurred on or about between January 31st, 1997 and January 31st, 1999 –

* * *

– at Bushey Drive, but (unintelligible) that this was at Manchester [Towers]. That's the problem.

[DEFENSE COUNSEL]: Your Honor, just because the indictment says that's when they happened doesn't mean they happened then, and that's our allegation that they –

THE COURT: Well, that's what they've got to prove.

[DEFENSE COUNSEL]: Right. And I am trying to rebut, I've taken upon

myself to, you know, relieve myself of having no burden of proof, we're putting on evidence, and we are aggressively showing that in our view these physical injuries that are clear that happened sometime before 72 hours –

* * *

. . . Happened sometime before 72 hours occurred at the hands of another and not at the hands of [appellant].

* * *

THE COURT: Well, first of all, that statement doesn't show that, but, even it did –

* * *

– I mean how do you get to proving evidence assuming, arguendo, that the statement was relevant and material, how do you get to put in evidence that pre-dates the date that the conduct allegedly occurred? There's just no support for that.

[PROSECUTOR]: And, Your Honor, there's no support in the statement as proffered by the Defense from the witness that this was a rape, or a (unintelligible) penetration or any sort of sexual touching that would, in fact, cause the trauma . . . . There's no specific details from this statement that can link up the abuse that the witness presumes was sexual that [defense counsel] is arguing is sexual caused the trauma that Dr. Mitchell testified about.
(Unintelligible) –

THE COURT: And you have two little kids –

[PROSECUTOR]: Right.

THE COURT: – of tender years talking to each other. I doubt very seriously that they had a discussion about, assuming, arguendo, it would be admissible, and it's not, but assuming it was I doubt very seriously that a couple of 5 year olds would be talking about whether something had sexual meaning or not.

Defense counsel then argued that Jessica's testimony should be admitted to impeach Yesenia's testimony that no one, other than appellant, had touched her. Ultimately, the court sustained the prosecutor's objection to Jessica's proffered statement.

Next, defense counsel called Yesenia as a witness and asked her: "Did you make a statement when you were young in the presence of Aricelli Chicas that it was your uncle –" The prosecutor objected and the court sustained the obection. Defense counsel requested to approach and argued to the court:

> – [] Chicas will say that in the car, this was not part of the trial last time –
>
> * * *
>
> – once in the car [Yesenia] told [] Chicas that, actually this is the way it went. . . . Yesenia said it's my uncle hits us. And Jasmine said go on, tell them more. And she says, okay, my uncle also touched me referring to Marco, and that would be the proffer of what [] Chicas would testify to. And, Your Honor, it was again before they moved into Bushey.

Reasoning that the proffered didn't "do anything," because it didn't "exclude anybody," the court sustained the prosecutor's objection.

On appeal, appellant contends that "[w]here Yesenia maintained that [appellant] was the only person who touched her inappropriately, [defense counsel] should have been permitted to present evidence of her allegations of inappropriate touching by people other than [appellant] to (1) explain to the jury the source of the trauma described by Dr. Mitchell, and (2) to challenge Yesenia's credibility with prior inconsistent statements." Accordingly, appellant argues that the court "erred in preventing [appellant] from probing [Yesenia's] allegations of inappropriate touching by people other than [appellant]." We disagree and explain.

"[T]he trial court is afforded great deference in its rulings on admissibility of evidence and [] rulings as to relevancy will not be disturbed on appeal unless there is a clear abuse of discretion." *Ware v. State*, 360 Md. 650, 672-73 (2000), *cert. denied*, 531 U.S. 1115 (2001). Further, reversal is not required "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Sifrit v. State*, 383 Md. 116, 128-29 (2004) (quoting *Merzbacher v. State*, 346 Md.391, 404-05 (1997)), *cert. denied*, 543 U.S. 1056 (2005).

A.

Relevancy

Appellant first argues that the trial court "erred in ruling that evidence of [appellant's] allegations of abuse by other people was inadmissible because it 'pre-dated' the charges

against [appellant] and because 'it doesn't do anything . . . . It doesn't exclude anybody.'"

(Ellipsis in original).

Maryland Rule 5-401 provides that:

> "Relevant evidence" means evidence 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 *Snyder v. State*, 361 Md. 580 (2000), the Court of Appeals explained:

> Relevance is a relational concept. Accordingly, an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, i.e., one that is properly provable in the case. In order to find that such a relationship exists, the trial court must be satisfied that the proffered item of evidence is, on its face or otherwise, what the proponent claims that item to be, and, if so, that its admission increases or decreases the probability of the existence of a material fact. Moreover, the relevancy determination is not made in isolation. Instead, the test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable.

Id. at 591-92 (citations omitted). "[R]elevancy is not the only test for admissibility of evidence." *Id.* at 592. Maryland Rule 5-403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence that is "ambiguous and equivocal," causing the jury to speculate, lacks probative

value and tends to increase the danger of unfair prejudice. *See Snyder*, 361 Md. at 596, 599-600.

In the case *sub judice*, there was no specific indication from the proffered testimony that the touching was actually sexual, other than what would have been the perception of a very young Jessica. Furthermore, neither the proffered statement about Corral's friend nor Yesenia's uncle tends to prove that the touching could have been the cause of the physical trauma Yesenia suffered, which included abnormalities and scarring to her hymen. Even if the victim had been "touched" on some prior occasion by someone other than appellant, it does not logically follow that the victim was touched in her vaginal area, the area of main concern to Dr. Mitchell's testimony. Accordingly, such testimony would only cause the jury to speculate and thus its prejudice outweighed any probative value.

B.

Impeachment Testimony

Appellant also contends that the evidence was admissible to impeach Yesenia's testimony that no one other than appellant sexually abused her.

Rule 5-613, entitled "Prior statements of witnesses," provides in pertinent part:

> (a) **Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is

given an opportunity to explain or deny it.

When impeaching a witness with a prior inconsistent statement, this Court has required a sufficient foundation in order to impeach, stating:

> The foundation is laid by interrogating the witness as to when, the place at which, and the person to whom such contradictory statements were made. This is but fair and just in order that the witness may be enabled to refresh his recollection in regard to such statements, and be afforded the opportunity of making such explanation as he may deem necessary and proper. If the witness denies making the designated statement or asserts that he does not remember whether he made it, the foundation contemplated by the general rule for the introduction of the statement has been satisfied.

McCracken v. State, 150 Md. App. 330, 342-43 (2003) (citations omitted) (quoting *State v. Kidd*, 281 Md. 32, 46 n. 8 (1977)).

In the instant case, Yesenia was asked during cross-examination as a State's witness whether she told Jessica, "the person who touched me was mom's friend?" Yesenia then denied that one of her mother's friends touched her inappropriately. Yesenia was also called by appellant as a defense witness, and was asked whether she made a "statement when you were young in the presence of [] Chicas that it was your uncle --" Even to the extent that these questions could be read as suggesting that the touching was inappropriate and sexual, given Yesenia's age when these statements were alleged to have been made, the questions lacked adequate details to give Yesenia a fair opportunity to address any apparent inconsistency. Therefore, the trial court did not abuse its discretion in prohibiting the evidence for purposes of impeaching Yesenia's testimony.

III.

Did the trial court err in curtailing evidence concerning parties that [Yesenia] was exposed to when she was with her mother, Gina Corral?

When Yesenia lived on Bushey Drive, she would spend some weekends at Corral's apartment. During the prosecution's direct examination, Yesenia testified that Corral "always had [a lot of] friends over." During cross examination, defense counsel asked Yesenia: "And, now when the people would come over [Corral's apartment] and have these parties . . . tell us what you saw." The prosecutor objected and the court instructed counsel to approach the bench.

THE COURT: What's the relevance about what she saw?

[DEFENSE COUNSEL]: This is something we went over last time. . . . The issue is that we have a witness [] Chicas who took the stand last time [(during the last hearing)] and did proffer outside the presence of the jury, that it was during these parties where people were chilling over where her mom was staying that [Yesenia] saw many men there with the girls on the couches with the other men.

I'm going to leave out any reference to cocaine and alcohol, but I deserve to ask the question, "Isn't it true that when you had these chilling parties you were hanging out with all the men that were invited during these chilling parties on the couch?" I'd like to ask [Yesenia] that question. I'm going to leave out any reference to drugs.

THE COURT: Well, first of all, this is clearly outside the scope of any direct examination. There was nothing

on direct examination about any chilling parties or anything. So I've allowed you some leeway. The second thing is that this is totally irrelevant.

[PROSECUTOR]: And it's not appropriate impeachment.

THE COURT: And it's clearly not impeachment. She hasn't said anything contrary to that and you just, this is supposed to be, as you know, cross-examination of the testimony that she gave this morning. She didn't tell us anything about any chilling parties.

[DEFENSE COUNSEL]: Your Honor, she said that nobody touched her at any of these places.

THE COURT: Well, true, but that's –

[DEFENSE COUNSEL]: I have a right to probe whether that is truthful or not.

THE COURT: You do.

[DEFENSE COUNSEL]: It is within the direct.

THE COURT: This is not – when did she say anything about parties and her mom? That's way outside the scope of direct.

[DEFENSE COUNSEL]: All right. I'm just –

THE COURT: You're trying to establish this witness as your own witness and get testimony from her, direct testimony from her. This isn't cross-examination.

[DEFENSE COUNSEL]: Well, I would ask the Court at the next break to order her to stay around for my case then. And I appreciate the Court's ruling and I just rest on my previous proffer, adopting the under oath testimony of [] Chicas at the last hearing as my proffer.

THE COURT: How do you do that through this witness?

[DEFENSE COUNSEL]: No, I'm doing it for the record –

THE COURT: Oh, okay.

[DEFENSE COUNSEL]: ` – as to what I expect the relevance of my questions.

THE COURT: Well, you can call Chicas and Chicas can testify. But this, you're cross-examining this young lady and she didn't [] about any parties.

[DEFENSE COUNSEL]: Okay.

THE COURT: And then even if she did, "What did you observe people doing," is not relevant to –

[DEFENSE COUNSEL]: Okay.

THE COURT: – whether anybody did anything to her.

[DEFENSE COUNSEL]: I'm going to ask the next question to save time then. I'm going to aks her, "Isn't it true that during the chilling parties you were hanging out with your mom and Yadira's male friends at the party?"

[PROSECUTOR]: I would object.

[DEFENSE COUNSEL]: You would object and the Court –

THE COURT: I'll sustain the objection.

[DEFENSE COUNSEL]: Okay.

THE COURT: It's not relevant.

* * *

And it's not cross examination.

Although the trial court stated that defense counsel could call Chicas to testify about the "chilling parties" at Corral's apartment, the court later prohibited defense counsel from presenting that testimony during defense counsel's direct examination of Chicas.

[DEFENSE COUNSEL]: Your Honor, may we approach now?

THE COURT: Sure.

(Bench conference follows:)

[DEFENSE COUNSEL]: Your Honor, I would just adopt the same arguments and the same proffer that we heard during the first trial. Your Honor heard –

THE COURT: Yes.

[DEFENSE COUNSEL]: – her sworn testimony under oath at the first trial out of the presence of the jury. Essentially it was that she came upon, she came over to

[Corral]'s one time, and she opened the door, and she saw a party where –

[PROSECUTOR]: (Unintelligible.)

[DEFENSE COUNSEL]: Oh, I'm sorry. Thank you. Thank you. Where she saw many men sitting around the couch the truth is drinking and smoking, but of course, I'm going to keep that out.

[THE COURT]: Actually she said they were drinking, and smoking and sniffing.

[DEFENSE COUNSEL]: Correct. Thank you. And Your Honor has it, so I would adopt that, and also to keep out any reference to any drugs or any membership in MS-13. And –

THE COURT: What's the relevance of that?

[DEFENSE COUNSEL]: – Your Honor, that the children were in the presence, on the couch with guests of Mom. . . . [I]t's relevant in and of itself, and I would submit.

THE COURT: Well, you say it's relevant, but how does it tend to prove or disprove allegations in this case?

[DEFENSE COUNSEL]: That during parties –

THE COURT: But none of these allegations have occurred in parties.

[DEFENSE COUNSEL]: I understand. I just adopt the same arguments I made last time and submit.

THE COURT: Sure. Sustained.

On appeal, appellant contends that the trial court erred in excluding evidence that Yesenia attended Corral's parties by limiting cross-examination of Yesenia and by sustaining an objection to Chica's testimony on the subject.[4] We disagree and explain.

The constitutional right of confrontation includes the right to cross-examine a witness about matters which effect the witness's bias, interest or motive to testify falsely. *Marshall v. State*, 346 Md. 186, 192 (1997). However, that right is not without limits and trial judges retain discretion "to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Smallwood v. State*, 320 Md. 300, 307 (1990) (internal quotations omitted).

Rule 5-611 (b) provides, in pertinent part, that "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." This Court has stated that, "[u]nder this rule, counsel always may cross-examine an opponent's witness in order to impeach the witness, but is entitled to ask substantive questions on cross only in the course of further inquiry into the point brought up on that witness'[s] direct examination."*Jackson v. State*, 132 Md. App. 467, 480-81 (internal

[4] Defense counsel also argues that Chicas testimony served to impeach Yesenia's statement that "she was never in the party, she was always in her room safe away from people." Upon reviewing the transcript, we were unable to find a statement by Yesenia disclaiming the fact that she was present during her mother's parties.

quotations omitted) (alteration in original), *cert. denied*, 360 Md. 487 (2000).

In the instant case, Yesenia merely testified that her mother always had a lot of friend's over. This testimony did not open the door on cross examination for defense counsel to question Yesenia about what she observed at "chilling parties," particularly because Yesenia neither referred to the gatherings as "chilling parties" nor did she state that she was in attendance when Corral "had friends over." Accordingly, the trial court did not err in precluding defense counsel from substantively probing into matters that were not explored during direct examination.

Moreover, any testimony regarding Corral's "chilling parties" was not relevant. Appellant was charged with child sexual abuse, two counts of rape in the second degree, and four counts of sexual offense in the third degree of Yesenia. Assuming that Yesenia was present during these parties on a couch at Corral's residence where other men were present, that alone does not establish that Yesenia was touched in an inappropriate sexual manner by one of these men. Furthermore, even if she were present, which required the jury to speculate beyond the facts in the proffer, that would not relieve appellant of any criminal culpability. We thus hold that the trial court properly exercised its discretion in excluding evidence concerning whether Yesenia was present during "chilling parties" hosted by Corral.

IV.

Did the trial court err in admitting an audio recording of the prior testimony of a key State's witness?

After the jury had been sworn, the prosecutor moved to admit Jasmine's former

testimony from the first trial, specifically noting that she was cross-examined by the same defense attorney who continued to represent appellant at the second trial. The prosecutor proffered that Jasmine was eight and a half months pregnant and living in Florida. The prosecutor also informed the court about a letter from Dr. Mowry, Jasmine's doctor, advising Jasmine not to travel. Jasmine was a key State's witness.

Defense counsel argued:

> The State has not made all reasonable efforts to get this witness here. We could have this witness here in four weeks according to the proffer in the letter.
>
> And we need this witness here, Your Honor. It's because it's a criminal defense case. [Appellant] has a Sixth Amendment right and the jury needs to see [Jasmine] eyeball-to-eyeball. It's a very, it's a crucial right. She's the only eyewitness.

The State replied:

> In this case [Jasmine] was served with a subpoena. I spoke with the detective in Ocala County, Florida. And that was when we made contact with [Corral], her mother, and Jasmine and got the name and number of her doctor to be able to speak with her to see if she would be able to travel.
>
> We had planned on them renting a car, coming in a train. Your Honor, no airline or train is going to let her on . . . in her advanced stage of pregnancy. I think that everything has been complied with and that her testimony should be permitted.

The court then ruled:

> All right. Well, with respect to the question of whether or not there is any improper conduct or bad faith . . . on behalf of the State in this case, I do not find that there is.

> The State issued a subpoena for this witness. The State made, took steps to make sure that the subpoena was served. The State was prepared to pay for the witness's transportation from the state of Florida to Maryland to testify in this case.
>
> But for the condition that the witness is in [] her final stages of pregnancy, she would be able to travel. But her doctor has ordered her not to travel. She testified on the previous occasion. The defense had the opportunity to confront her on the previous occasion and, indeed, they did. The, in the terms of the confrontation clause, the witness was confronted by the defendant through cross-examination when she testified.
>
> Now it isn't as if somehow there's going to be something new on this tape. The State is stuck with the tape of her previous testimony, the direct examination. The defense is stuck with the cross-examination. It's a wash in terms of what this witness will say to the jury.
>
> Perhaps the State would like to have asked some additional questions based upon what they learned from the last trial, which ended in a mistrial. Or perhaps the State would want to go into some other areas, but they can't do either. And, of course, neither can the defense.

The court then overruled defense counsel's objection and defense counsel moved for a mistrial and, alternatively, a postponement until after Jasmine had the child. The court denied both motions.

On appeal, appellant argues that "the State failed to take reasonable, good faith measures to ensure Jasmine's presence," and that the State should have requested a continuance. Additionally, appellant argues that Jasmine's pregnancy "did not render her 'unavailable'," because "the circumstances were not that she would not in the near future be able to appear in court." Therefore, appellant argues that "[t]he trial court erred when it

admitted the prior trial testimony of Jasmine as an unavailable witness," and "in turn violated [appellant]'s constitutional rights, under the United State's Constitution and the Maryland Declaration of Rights, to confront the witness against him."

Rule 5-804(a)(4) provides that a declarant may be unavailable as a witness if that declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." Additionally, Maryland Rule 5-804(b)(1) excepts former testimony from the hearsay rule provided that the testimony was "given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

The Court of Appeals stated in *State v. Breeden*, 333 Md. 212, 222 (1993) that "[i]n such circumstances, the receipt in evidence of the prior testimony does not offend either the confrontation requirement or the hearsay rule."

"The determination of whether a witness is 'unavailable' within the meaning of the rule is within the discretion of the trial court, and we review the trial court's decision under an abuse of discretion standard." *Cross v. State*, 144 Md. App. 77, 88, *cert. denied*, 369 Md. 180 (2002). The State bears the burden of establishing good faith efforts and due diligence in procuring the witness. *See Breeden*, 333 Md. at 221.

> "[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand

> their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.'"

Id. (ellipsis in original) (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

In the case *sub judice*, the first trial ended in a hung jury. Thereafter, appellant was tried on the same charges as before, with the only exception being that the time frame alleged in the indictment was shortened. Therefore, defense counsel had the opportunity and similar motive to develop Jasmine's testimony by cross-examination at the first trial. Additionally, after setting this case in for a retrial, the prosecutor made reasonable efforts to procure the attendance of Jasmine. But for her pregnancy, her imminent delivery date, and her doctor's orders, she would have been able to travel from Florida to attend the second trial. Therefore, we adopt the reasoning of the trial court and hold that Jasmine was unavailable and thus her former testimony was admissible.

V.

Did the trial court err in its conduct of voir dire?

During that *voir dire* examination, the court asked the following question:

> Is there any member of the prospective jury panel for whom English is a second language, and you believe it would be difficult for you to understand a trial which may have technical terms, not everyday terms?

Seven prospective jurors responded and each of them were questioned individually by the trial court. Over an objection by defense counsel, the court excused all seven jurors.

The purpose of *voir dire* is "to ascertain the existence of cause for disqualification and

for no other purpose." *Davis v. State*, 333 Md. 27, 34 (1993) (internal quotations omitted). As there is no statute in Maryland regarding either the procedure or questions to be asked on *voir dire*, Maryland courts have "consistently looked to Maryland's common law for guidance." *Id.* at 34. Under Maryland common law, "the scope of *voir dire* and the form of the questions propounded rest firmly within the discretion of the trial judge." *Id.*

On appeal, appellant concedes that the first part of the question was a proper area of inquiry, but that the compound nature of the question violated the Court of Appeals's holding in *Dingle v. State*, 361 Md. 1 (2000). We disagree and explain.

In *Dingle*, the appellant

> sought to have the trial court inquire of the venire panel whether any of them had certain experiences or associations. While the court agreed to, and did, make the inquiries the [appellant] requested, it did so by joining with each of the [appellant]'s requested inquiries, one suggested by the State, namely an inquiry into whether the experience or association posited would affect the prospective juror's ability to be fair and impartial.

Id. at 3-4. For example, one of the questions the court asked was:

> Have you or any family member or close personal friend ever been the victim of a crime, and if your answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this case in which the state alleges that the defendants have committed a crime?

Id. at 4 n.4. The court then instructed the jurors to stand if they answered yes to *both parts* of the question, and if the jurors answered no to either part of the question, they were instructed to remain seated. *Id.* at 5. Those jurors who stood were excused. *Id.*

The appellant objected to the compound question, arguing that by "asking compound questions and requiring an answer only if the prospective juror thought that he or she could not be fair, would, and, in fact did, result in a jury in which the venire persons themselves, by 'unilateral decision,' determined their fitness to serve on the jury." *Id.* at 8.

The Court of Appeals explained:

> "There are two areas of inquiry that may uncover cause for disqualification: (1) an examination to determine whether prospective jurors meet the minimum statutory qualifications for jury service, *see* Maryland Code (1974, 1989 Repl.Vol., 1992 Cum.Supp.), *Courts & Judicial Proceedings Article*, § 8-207; or (2) "'an examination of a juror . . . conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him.'"

Id. at 9-10 (alteration in original) (quoting *Davis*, 333 Md. at 35-36). The Court went on to conclude that the trial judge was the "focal point" in the *voir dire* process with the "predominant function [of] determining juror bias." *Id.* at 15 (internal quotations omitted).

Explaining the problem with the compound question asked in *Dingle*, the Court stated:

> rather than inquiring into the prospective juror's mind set in a vacuum, the trial judge, presumably understanding that it [was] the correlation between the juror's status and his or her state of mind that [was] dispositive when the venire person's status or experience [was] relevant to his or her bias, linked the question whether the venire person could be fair and impartial with the venire person's status or experience.
>
> The trial judge's mistake was that he failed to appreciate that, should there be a challenge, he had the responsibility to decide, based upon the circumstances then existing, *i.e.* in addition to the venire person's bottom line conclusion in that regard, as reflected in the answers he or she gives, the character and duration of the position, the

> venire person's demeanor, and any and all other relevant circumstances, or, in other words, whether any of the venire persons occupying the questioned status or having the questioned experiences should be discharged for cause, or whether a demonstrably strong correlation exists between the status or experience in question and a mental state that gives rise to cause for disqualification. Because he did not require an answer to be given to the question as to the existence of the status or experience unless accompanied by a statement of partiality, the trial judge was precluded from discharging his responsibility, exercising discretion, and, at the same time, the [appellant] was denied the opportunity to discover and challenge venire persons who might be biased.

Id. at 17 (internal quotations, citations, and alterations removed).

The Court of Appeals even emphasized in *Dingle* that the trial judge did not abuse its discretion solely because the question was compound. *Id.* at 11. The issue was "much more basic and fundamental. It relate[d] to the role of the trial judge in the jury selection process and, perhaps most important, how the principles that are the very end and aim, of the voir dire procedure [were] to be applied." *Id.* (citation and internal quotations removed).

Unlike *Dingle*, the *voir dire* question in the instant case was not asked to uncover any bias on the part of the prospective juror, which, in turn, might have required individual inquiry by the trial judge. Instead, the court asked the question to discern if any juror would have trouble understanding the trial. The question did not necessitate further inquiry by the court. It merely asked if it would be difficult for a juror to understand a trial "which may have technical terms," *because* English is the juror's second language.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.