UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 737

September Term, 2015

DANIEL BRYNAN KERSTETTER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: September 7, 2016

A jury in the Circuit Court for Worcester County convicted Daniel Brynan Kerstetter, the appellant, of seven counts of distribution of child pornography and twenty-one counts of possession of child pornography. He was sentenced to ten years' imprisonment, all but five years suspended, and three years' supervised probation upon release. Pursuant to Md. Code (2001, 2008 Repl. Vol., 2015 Supp.), section 11-707 of the Criminal Procedure Article ("Crim. Proc."), he is required to register as a sex offender for a mandatory term of twenty-five years.

The appellant presents three questions for review, which we have reorganized and rephrased as follows:

I. Did the trial court abuse its discretion by permitting the State to amend the indictment on three occasions, over defense counsel's objections?

II. Did the trial court err by allowing the prosecutor to comment during closing argument about the appellant's failure to call Charles Walters as a witness in his defense?

III. Was the evidence legally sufficient to sustain the appellant's conviction for distribution of child pornography as charged in Count 5 of the indictment?

For the following reasons, we shall affirm the judgments.

FACTS AND PROCEEDINGS

On May 8, 2014, Detective Michael Wagoner of the Page County, Virginia Sheriff's Office, Internet Crimes Against Children Task Force (the "Task Force"), was conducting an undercover child pornography investigation on a "peer-to-peer file sharing" network. A "peer-to-peer" network provides free file-sharing software to users

on the internet. The software allows a user to download audio, video, and image files directly from other users' computers, without going through a centralized server. To be paired, both users must be connected to the internet. Detective Wagoner was surveilling a particular "peer-to-peer" network called Ares. He was running searches using file names that law enforcement previously had flagged as "child exploitation material."

Another computer on the Ares network "was identified as [a] potential candidate for at least three files of investigative interest." That computer was connected to the internet through an IP address registered to the appellant. Between 1:36 a.m. and 8:49 a.m. that day, Detective Wagoner downloaded seven child pornography videos from the appellant's computer. He copied them and all his investigative files to a CD and sent the CD to Detective Alex Kagan of the Worcester County Sheriff's Office ("WCSO"). Detective Kagan is a member of the Maryland division of the Task Force.

On July 2, 2014, Detective Kagan and members of the WCSO executed a search warrant at the appellant's mobile home in Berlin. A plaque hanging on the wall showed that he had earned an "A[+] certification" in the field of PC repair, indicating to the officers that he had "a certain level of knowledge of computers[.]" In their search, the officers recovered a laptop computer from the appellant's vehicle; a hard drive from a desktop computer located in the appellant's bedroom; and seven additional hard drives and two USB thumb drives, also from the appellant's bedroom.

In August 2014, forensic analyst Steven Gibson, with the U.S. Department of Homeland Security ("DHS") Investigations Unit, performed a forensic search of the

seized items. Two of the hard drives recovered from the appellant's bedroom contained suspected child pornography. One contained two image files and another contained twenty video files. He copied these files to a CD and gave it to Detective Kagan for further review.

On January 21, 2015, the appellant was indicted on seven counts of distribution of child pornography and twenty-three counts of possession of child pornography. All the distribution counts (1 through 7) and seven of the possession counts (8 through 14) were based on the files Detective Wagoner downloaded from the appellant's computer on May 8, 2014. The additional possession counts (15 through 30) were based on the two image files and fourteen of the twenty videos recovered in Mr. Gibson's search.[1]

A two-day jury trial commenced on May 12, 2015. In its case, the State called Detectives Wagoner and Kagan, and Mr. Gibson. During Detective Wagoner's testimony, the State moved into evidence the CD he had sent Detective Kagan containing the seven video files he (Detective Wagoner) had downloaded on May 8, 2014. The State displayed on a monitor the CD's menu screen, which showed the file names of all seven video files. The State played one video file in its entirety and a clip from a second video file entitled "sleeping beauty russian 11yr old(2).mpg," which we shall discuss below. Detective Wagoner described the contents of the other five video files, which the appellant stipulated were child pornography.

[1] At the outset of trial, the State entered *nolle prosequi* on Counts 25 and 27.

Mr. Gibson testified about his forensic examination. He identified the two image files he found on one hard drive and described eleven of the twelve video files he recovered, which the appellant stipulated contained child pornography. The twelfth video file was published to the jury. He testified that different hard drives can be removed from and installed into a desktop computer.

Detective Kagan testified that on the day of the search, the appellant waived his *Miranda*[2] rights and voluntarily spoke to him and Special Agent Mark Joyner of the DHS. He was interviewed at his mobile home, while the search was being carried out, and, later, at the sheriff's office. The sum and substance of these interviews was that the appellant had been using Ares for "a number of years" to download movies, including pornography. He would download files overnight to reduce internet fees. He acknowledged that he "liked younger girls, and he liked just looking at them." On "[s]everal occasions," he had downloaded child pornography without realizing it, but had deleted it when he saw what it was. He had a computer in his bedroom and was the only person who used it.

On cross-examination, Detective Kagan acknowledged that the appellant had "mentioned a former roommate he had had." The detective could not recall the former roommate's name. He explained that because the timeframe in which the appellant and his former roommate had lived together "was far enough away[, he] didn't question [the appellant] further about it."

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

The appellant took the stand and testified as follows. His hobby is fixing computers. He often repairs broken hard drives that other people no longer want and give to him. He never looks at what is on them. He denied ever seeing the image and video files identified by Detective Wagoner and Mr. Gibson, and claimed that the "active" hard drive he had been using in his desktop computer was one that Mr. Gibson determined did not contain suspected child pornography. He clarified that the "younger girls" he had referred to in his police interview were "18, 19 years old." He denied telling Detective Kagan that he had downloaded child pornography and deleted it when he realized what it was. As we shall discuss in more detail below, he claimed that his former roommate, Charles Walters, had downloaded the child pornography. On cross-examination, he said he would download "[i]ncest, stuff like that, mother, daughter," but that it was "role-playing," not child pornography. He had "no idea [child pornography] was on [his] computer."

The appellant called three witnesses, all acquaintances of his. The first witness testified that on one occasion he saw Charles Walters using the appellant's laptop computer. The second witness verified that Mr. Walters lived with the appellant during the relevant time period but testified he never saw Mr. Walters use the appellant's computers. The third witness testified that he once observed Mr. Walters using the desktop computer in the appellant's "living room."

As noted, the jury convicted the appellant on seven counts of distribution of child pornography and twenty-one counts of possession of child pornography. After sentencing, he noted a timely appeal.

We shall include additional facts as pertinent to the issues.

DISCUSSION

I.

The appellant contends the trial court abused its discretion by permitting the State to amend the charging document on three separate occasions. Rule 4-204 states:

> On motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required. If amendment of a charging document reasonably so requires, the court shall grant the defendant an extension of time or continuance.

"The purpose of [Rule 4-204] is to prevent any unfair surprise to the defendant and his counsel." *Counts v. State*, 444 Md. 52, 66 (2015) (internal quotation marks and citations omitted). Consent of both parties is not needed, however, when the charging document is amended in form rather than substance. *See Albrecht v. State*, 105 Md. App. 45, 67–68 (1995); *see also Rich v. State*, 205 Md. App. 227, 242 (2012) (holding reversible error occurs only when an amendment "change[s] the character of the offense"). "Matters relating to the character of the offense are those facts that must be proved to make the act complained of a crime." *Tapscott v. State*, 106 Md. App. 109, 134 (1995). We review a trial court's decision to grant a request to amend the charging document for abuse of discretion. *State v. Huntley*, 411 Md. 288, 307 (2009).

Counts 29 and 30 of the original charging document alleged that the appellant possessed "films" entitled "1_fucked-tube.com[1].jpg" and "689_Small_Chinese[1].jpg," respectively, in violation of Md. Code (2002, 2012 Repl. Vol.), section 11-208(a) of the Criminal Law Article ("CL").[3] At the outset of trial, the State moved to amend Counts 29 and 30 to replace the word "film" with "visual representation." The court granted the amendment over the appellant's objection.

Relying upon *Johnson v. State*, 358 Md. 384 (2000), the appellant contends changing the term "film" to "visual representation" constitutes "a change in the character of the offense." *Id.* at 389. Johnson was charged with possession of marijuana, a controlled dangerous substance ("CDS"), and possession with intent to distribute marijuana. Before trial, the State moved to amend the charging document to replace "marijuana" with "crack cocaine." The court granted the State's request over objection and Johnson was convicted. The Court of Appeals reversed, holding it was "'clear that the basic description of the offense [was] indeed changed when an entirely different act [was] alleged to constitute the crime,'" *i.e.*, possession and possession with intent to

[3] CL Section 11-208(a) states:

> (a) A person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual representation showing an actual child under the age of 16 years:
>
> (1) engaged as a subject of sadomasochistic abuse;
>
> (2) engaged in sexual conduct; or
>
> (3) in a state of sexual excitement.

distribute crack cocaine rather than marijuana. *Id. (*quoting *Thanos v. State*, 282 Md. 709, 716 (1978)).

Johnson is distinguishable. As the Court of Appeals noted, although CL sections 5-601 and 602 prohibit possession and possession with intent to distribute a CDS generally, the penalties associated with these offenses vary based on the type of CDS. At the relevant time, the penalty for possession of crack cocaine was up to twenty years' imprisonment and/or a $25,000 fine; in contrast, the maximum penalty for possession of marijuana was five years' imprisonment and/or a $15,000 fine. Moreover, the State bore the burden of proving the "particular [CDS] in order to convict." *Id.* at 392. By amending the charging document and "changing the identity of the [CDS]," the State "change[d] an element of the offense charged," thereby charging Johnson "with a different offense." *Id.*

In this case, permitting the State to change the term "film" to "visual representation" did not have the same effect. CL section 11-208(a) prohibits the possession of any "film, videotape, photograph, or other visual representation showing an actual child under the age of 16 years" engaging in prohibited activities. Possessing a film or visual representation is not, in itself, illegal. It is the content, in any form, that makes possession a crime. And a film is in the same category as a visual representation, whereas marijuana and crack cocaine are classified as different types of CDS carrying different penalties. Thus, changing the term "film" to "visual representation" did not alter the State's burden to prove that the appellant indeed possessed child pornography.

Moreover, the appellant could not have been unfairly surprised by the amendment. The file names in the original indictment specified that they were JPEG files, indicating they were images and not films.[4] Detective Kagan testified that the appellant had an "A[+] certification" in PC repair, and the appellant testified that he is "a computer service technician, a network installer certified," and agreed that he knows his "way around a computer." It is unlikely that the appellant would not have realized that the JPEG files he originally was charged with possessing were visual representations (images) and not films. The State's amendment was in form, not substance, and the trial court did not abuse its discretion by permitting the State to amend Counts 29 and 30.

Counts 8 through 14 of the original indictment alleged that on July 2, 2014, *i.e.*, the date Detective Kagan and the WCSO executed the search warrant at the appellant's residence, the appellant "did knowingly possess" certain films "depicting an individual under 16 years of age engaged in sexual conduct." On the first day of trial, shortly after the jury was sworn in, the State moved to amend the dates in these charges to May 8, 2014, *i.e.*, the date Detective Wagoner downloaded the files from the appellant's computer. The court permitted the amendments over objection.

"We have repeatedly held that the date that an indictment alleges that the criminal conduct occurred 'may be amended in the court's discretion without changing the character of the offense.'" *Thompson v. State*, 181 Md. App. 74, 99 (2008) (quoting

[4] A JPEG is a compressed "image file format." *File Formats: JPEG*, TechTerms (July 26, 2016), http://techterms.com/definition/jpeg.

Manuel v. State, 85 Md. App. 1, 18–19 (1990)), *aff'd*, 412 Md. 497 (2010); *Holbrook v. State*, 133 Md. App. 245, 259–260 (2000); *Tucker v. State*, 5 Md. App. 32, 34–35 (1968). Accordingly, the trial court did not err in permitting the State to amend the dates in Counts 8 through 14.

After the State rested its case-in-chief, the appellant moved for judgment of acquittal on Count 5 on the ground that the State had failed to produce evidence that he had distributed a file entitled "11yr old(2).mpg." Defense counsel argued that the clip shown to the jury was entitled "sleeping beauty russian 11yr old(2).mpg," which differed from the title in the indictment.

The State responded that the file referenced in Count 5 was the same file specified in Count 12; that Count 12 provided the full title; and that the discrepancy was a typographical error. It maintained that the appellant was "put on notice of the fact that the actual file name – the complete file name is [sleeping beauty russian 11yr old(2).mpg], because Count 12 contains exactly that title" and "Detective Wagoner's report accurately reflects the entire name of the file and the contents of that file" so there was "no prejudice to the [appellant] by that typographical error." The State moved to amend the title in Count 5 to reflect the title in Count 12.

Defense counsel objected, arguing that the State could not amend the charging document because it already had rested its case. The court responded:

> Well, I don't think the State having rested its case is dispositive of an amendment. The question is whether it is an amendment of substance or not. And it's clear to me that it's not an amendment to substance. That the defense knew from the beginning or at least after the receipt of discovery

> that that particular file was the same as the file in Count No. 12 and simply was – the description of it was incomplete.
>
> The motion to amend is granted with respect to Count No. 5.

On appeal, the appellant contends the court erred in so ruling. He argues that "before the amendment, he was charged with distributing a file with one name; after the amendment, he was charged with distributing a file with a different name"; and that that change was one of substance rather than form.

The State counters that the appellant's argument on appeal is not preserved because "[a]t trial, [defense] counsel's objection to the amendment was limited to the fact that the State was moving to amend after it had rested its case[,]" and that "[c]ounsel may not rely on grounds not raised below to challenge the court's ruling allowing the amendment on appeal." On the merits, the State argues that "the description of the image distributed was not a fact that the State had to prove" and that the appellant "was aware that the subject of [C]ount 5 was the same as the subject of [C]ount 12[.]"

We disagree that the argument the appellant now advances is not preserved for appellate review. "Ordinarily, the appellate court will not decide [an issue other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). The trial court clearly stated that "[t]he question is whether it is an amendment of substance or not," and ruled that it was "clear . . . that it's not an amendment to substance." Thus, the issue is preserved for review.

Nevertheless, the appellant's argument lacks merit. It is apparent that the State's omission of the file's full title was merely a typographical error. With the exception of

Counts 5 and 12, all the files described in the distribution counts—Count 1 through 7—are identical to the files identified in the corresponding possession charges in Counts 8 through 14. Moreover, the entire file name was included in Detective Wagoner's report, which was provided to the appellant in discovery. The appellant was on notice that the same file supported the charges in both Counts 5 and 12, and therefore the amendment was one of form, not substance. *See Corbin v. State*, 237 Md. 486, 490 (1965) (so long as a criminal indictment "give[s] the accused notice of what he is called upon to defend," an amendment changing "precise words" is a formal change, rather than substantive). The trial court did not abuse its discretion under the circumstances.[5]

II.

The appellant testified that Mr. Walters lived with him from November 2011 until June 9, 2014, on which date the appellant evicted him. According to the appellant, Mr. Walters used his desktop computer to download music "all the time" because he "did not have a computer of his own." When Mr. Walters downloaded music and videos from the internet, the files "went to [the appellant's] shared folder on the desktop, and [Mr. Walters] would cut them and put them into [Mr. Walters's own] folder in [the appellant's] music part of the program."

[5] The argument below about the timing of the amendment also lacks merit. As stated, Rule 4-204 permits a party to amend the charging document "at any time before verdict," and the record clearly shows that the jury had not yet reached a verdict when the State moved to amend Count 5.

On cross-examination, when asked whether Mr. Walters would have downloaded the child pornography found on the hard drives, the appellant responded, "He's the only other one that could have possibly have done it." The appellant did not call Mr. Walters as a witness at trial.

In closing argument, the prosecutor remarked:

> Today all of a sudden everyone has access to [the appellant's] computer. Most importantly, this roommate ***Charlie* [*Walters*] *that we have not heard from*** today lived with him, had access, not only just once or twice, but on a regular basis from the time they lived together in 2011 until he moved out in 2014.
>
> * * *
>
> So the implication again is that somebody else whose computer that is not -- it does not belong to him, is not only watching child pornography, downloading child pornography, but this roommate Charlie [Walters] apparently was also creating files on [the appellant's] computer, three separate files, on which he was saving his own child pornography to then come back to later and watch at a later time for his own purpose knowing it's not his bedroom, not his computer. I ask that you think about how logical that sounds to think that this man ***who we haven't heard from today, we've heard from other individuals who were familiar with Charlie* [*Walters*]**, apparently was the one who was responsible for all of this.
>
> * * *
>
> It's rare that you will ever catch someone, you know, on camera watching child pornography or walk in on someone doing that. The fact has to be inferred from the circumstances, that they knew that was child pornography and they knew what they possessed at the time. It's hard -- you're never going to have someone who – it's very rare to have someone who admits to possessing that kind of material. ***Most of the time they will blame someone else for that possession which is where Charlie* [*Walters*] *comes into this picture.***

(Emphasis added.)

Immediately after the prosecutor's closing argument, defense counsel asked to approach the bench and objected to the prosecutor's comments about Mr. Walters's absence from trial. She argued that these comments were improper because they "shift[ed] the burden to the defendant" to prove his innocence. She asked the court to give a curative instruction reminding the jury that the State bore the burden of proving the appellant's guilt beyond a reasonable doubt.

The court overruled the objection, explaining:

> Well, I think the State can point out the absence of evidence. The State didn't ask for a missing witness instruction. No one explored the reasons why [Mr. Walters] wasn't here and the availability.
>
> But having said that, I think it's [a] fair comment by the State, and I don't think it has the effect of shifting the burden of proof on the defendant. So the request for a curative instruction – the objection is overruled. The request for a curative instruction is denied.

Defense counsel proceeded with closing argument, responding to the prosecutor's remarks as follows:

> There's a mention of a former roommate, but it's concluded by Detective Kagan that – he determined that it was two or three months prior to the execution of the search warrant, so it wasn't investigated. That wasn't in [Detective Kagan's] report. The statement that my client indicates that he's the only one that uses the computer is not in the report. So there are some very important things and key components that would be missing.
>
> And the only reason I raise that is the – not to point out any defect or flaw with Detective Kagan personally, ***but you have to remember it's the State's burden in this case. It's the State's burden to prove this case to you, all 12 of you, beyond a reasonable doubt, and they have to do that all throughout the course of trial.***

* * *

> And you also heard that [the appellant] didn't have to testify because, again, it's the State's burden. **[*The appellant*] *doesn't have to defend himself so to speak because it is the State that must prove the case whether he chooses to testify or not.***
>
> * * *
>
> And as far as Charlie [Walters] being here, if you remember, [the appellant] testified that ***Charlie* [*Walters*] *was kicked out. Charlie* [*Walters*] *was evicted. Charlie* [*Walters*] *was served a protective order. Why would* [*Mr. Walters*] *be here today? Why would* [*Mr. Walters*] *come in, look at the 12 of you and say, yup, it's my porn? Why would he?***

(Emphasis added.)

Arguing that "it is improper for a prosecutor to negatively comment on the defendant's failure to . . . present evidence on his own behalf," the appellant contends the trial court erred by overruling his objection to the prosecutor's remarks in closing argument and denying his request for a curative instruction. He maintains that if he had called Mr. Walters as a witness, Mr. Walters probably would have invoked his Fifth Amendment privilege and refused to testify or he would have denied any involvement in possessing or distributing child pornography.[6] He asserts that "[t]he State's argument in this case improperly shifted the burden to him" to prove Mr. Walters's criminal agency. He relies upon *Christensen v. State*, 274 Md. 133 (1975).

The State relies upon *Mines v. State*, 208 Md. App. 280, 301-02 (2012), to argue that when a defendant testifies "and, in his own testimony, identifie[s] potential

[6] The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself."

exculpatory witnesses, but call[s] none of them to the stand, questions as to their absence . . . d[o] not constitute improper burden shifting.'" It maintains that *Christensen* is inapposite; and the appellant's assertion that Mr. Walters would have invoked his Fifth Amendment right to remain silent if called to testify is "speculative."

Christensen was an attempted rape case. The victim testified that she was hitchhiking and Christensen, accompanied by his friend, Jesse Paine, picked her up and drove her to her house. *Christensen v. State*, 21 Md. App. 428, 431 (1974). Later that day, Christensen and Paine saw her hitchhiking again. *Id.* According to the victim, Christensen forced her into his vehicle, attempted to rape her, and told Paine that he (Christensen) would "'get her first' and Paine could 'have her after [him].'" *Christensen*, 274 Md. at 136.

Christensen testified in his own defense. His version of the events was that the victim had offered sexual favors in exchange for a ride home. *Christensen*, 21 Md. App. at 431. He did not call Paine as a witness. He asked the trial court to instruct the jury "that 'there [was] no duty on the defendant to produce [Paine] and no inference [should] be drawn from the fact that he wasn't produced.'" *Christensen*, 274 Md. at 136. The court denied his request. In closing, the prosecutor argued that the jury should draw an adverse inference from Christensen's failure to call Paine to corroborate his testimony. Christensen was convicted and this Court affirmed. *Christensen*, 21 Md. App. at 431.

The Court of Appeals granted Christensen's petition for writ of *certiorari* and reversed. The Court held that "[n]o inference arises if the person not called as a witness

by the defendant is a codefendant or an accomplice not presently on trial, or has already been convicted of the same offense as that for which the defendant is being prosecuted." *Christensen*, 274 Md. at 139–40 (quoting with approval 1 Charles E. Torcia, *Wharton's Criminal Evidence* § 148 (13th ed. 1972)). It reasoned that if Paine were called to testify, he likely would have invoked his Fifth Amendment right against self-incrimination, which would further implicate Christensen.

> In short, if the exception to the rule for a codefendant or an accomplice did not exist, [Christensen] would be faced with a Hobson's choice incompatible with our concept that a defendant is innocent until proven guilty beyond all reasonable doubt and that the burden of proof never shifts from the State.

Id. at 140. The Court concluded that, under the circumstances, the trial court erred by denying Christensen's requested instruction and permitting the State to argue that an adverse inference could be drawn from Paine's absence. *Id.* at 141.

We agree with the State that *Christensen* does not apply here. The prosecutor did not make an adverse inference argument. She commented that, according to the appellant's testimony, Mr. Walters could have exculpated him, but the appellant did not call him as a witness. Also, Mr. Walters was not alleged to be an accomplice of the appellant, nor was he a codefendant. Rather, he was the person that the appellant was claiming had possessed and distributed the child pornography, instead of the appellant.

We also agree with the State that *Mines v. State*, 208 Md. App. 280, is most pertinent to the issue here. Mines was charged with the attempted armed robbery of a pizza delivery driver and related crimes. The victim testified that after he made a

delivery, he returned to his truck and entered through the passenger's side front door because the driver's side front door was not working. He was barely inside his truck when a man carrying a knife approached the truck on the passenger side and demanded that he stop. The victim managed to close and lock the front passenger side door. The robber scraped his knife against the window and told him to get out and give him all his money or he would stab him. The victim reached for his cell phone and then noticed that the man had run away. He also noticed across the street two men who started running away with the man who had attempted to rob him. He drove after them and was intercepted by the police, who followed and detained the three men.

Mines testified in his own defense. On cross-examination, he stated that on the night of the attempted robbery he was playing basketball with several men and drove his girlfriend, their child, and all but one friend home. Right around the time of the attempted robbery, he and the one friend got some food at McDonald's and then returned to his girlfriend's house, where they stood in the driveway talking. He identified that friend as Tony Ash and further testified that his girlfriend and his neighbor saw him standing in the driveway talking. Over objection, he acknowledged that although Ash, his girlfriend, and his neighbor could account for his whereabouts at the exact time of the attempted robbery, he did not call any of them to testify.

In closing argument, the prosecutor emphasized that according to Mines's own testimony, there were several people who knew firsthand that he was not at the location

of the attempted robbery when it was committed, but he did not present any of them as witnesses.

On appeal, Mines contended that the prosecutor's questions on cross and comments in closing about his failure to call witnesses whose testimony could have exculpated him improperly shifted the burden of proof to him to prove his innocence. We rejected that contention, explaining that courts in other jurisdictions had concluded that there is no improper burden shifting when the defendant has testified on his own behalf and fails to call witnesses to corroborate his testimony:

> "A prosecutor's comment on a defendant's failure to call a witness does not shift the burden of proof, and is therefore permissible, so long as the prosecutor does not violate the defendant's Fifth Amendment rights by commenting on the defendant's failure to testify."

Mines, 208 Md. App. at 299 (quoting *United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000)). When a defendant testifies, however, his Fifth Amendment rights are not implicated.

> "While it is axiomatic that the prosecutor cannot comment on a defendant's failure to testify . . . once a defendant has taken the stand in her own defense, the prosecutor is not precluded from impugning the defendant's credibility by commenting on her failure to produce any corroborating evidence."

Id. at 300 (quoting *United States v. Boulerice*, 325 F.3d 75, 86–87 (1st Cir. 2003) (citations omitted)). We concluded that "where [the defendant] testified in his own defense and, in his own testimony identified potential exculpatory witnesses, but called none of them to the stand, questions as to their absence . . . did not constitute improper burden shifting." *Id.* at 301–02.

The principle we recognized in *Mines* applies here. The appellant testified on his own behalf and stated that Mr. Walters, not he, had downloaded and was in possession of the child pornography found on his computers, without his knowledge. The appellant could have called Mr. Walters to testify to those facts. If Mr. Walters had so testified, corroborating the appellant's testimony, that would have exculpated the appellant. The trial court did not abuse its discretion by permitting the prosecutor to point out to the jury that the appellant did not call the one witness who, according to the appellant's own testimony, could have corroborated his version of events.

Had Mr. Walters been compelled to appear at trial and invoked his Fifth Amendment privilege against self-incrimination, there was no reasonable possibility that his doing so would have harmed the appellant's defense. To the contrary, his refusal to testify would have been "entirely consistent" with the appellant's testimony, *Robinson v. State*, 315 Md. 309, 320 (1989), and "compatible" with the defense theory that it was Mr. Walters, not the appellant, who had possessed and distributed child pornography. *Garrison v. State*, 88 Md. App. 475, 486 (1991). The "jury would not have needed to discredit the [appellant's] testimony if [Mr. Walters] had invoked his privilege against self-incrimination." 5 Lynn McClain, *Maryland Evidence, State and Federal* § 303:4, at 543 (Thompson Reuters, 3d ed. 2013) (citing *Garrison*, 88 Md. App. at 483–86). The court properly determined that "the State can point out the absence of evidence" and that the prosecutor's remarks were "fair comment[s]."

III.

Finally, the appellant contends the evidence was legally insufficient to support his conviction on Count 5. We disagree.

> Ordinarily, "[t]his Court reviews a question regarding the sufficiency of the evidence in a jury trial by asking whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cox v. State*, 421 Md. 630, 656–57 (2011) (citations and internal quotations marks omitted).
>
> "In determining whether evidence was sufficient to support a conviction, an appellate court 'defer[s] to any possible reasonable inferences [that] the trier of fact could have drawn from the . . . evidence[.]'" *Jones v. State*, 440 Md. 450, 455 (2014) (quoting *Hobby v. State*, 436 Md. 526, 538 (2014)). "We defer . . . and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010) (citing *State v. Smith*, 374 Md. 527, 557 (2003)).

Grimm v. State, 447 Md. 482, 494–95 (2016) (alterations in original) (parallel citations omitted).

The appellant was on notice from the charging document and discovery provided by the State that the file he was charged with distributing in Count 5 was the same file that formed the basis for the possession offense in Count 12. As explained, the court did not abuse its discretion by permitting the State to amend its typographical error in Count 5 to include the file's full title, "sleeping beauty russian 11yr old(2).mpg." Detective Wagoner testified that this file was one of the seven files he downloaded from the appellant's computer on May 8, 2014, and that the appellant's computer was connected to the internet through an IP address registered in his name. Detective Wagoner copied that

file, along with the six other files, to a CD and sent it to Detective Kagan. The menu screen of that CD was published to the jury showing the title reflected in Count 5, as amended, and Count 12. A clip from that file was played for the jury. In the light most favorable to the prosecution, the evidence was legally sufficient to support the appellant's conviction for distribution of child pornography in Count 5, as amended.[7]

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

[7] Even if the court erred in permitting the State to amend the charging document—which it did not—the evidence still sufficiently established that a file containing the charging document's original description, *i.e.*, "11yr old(2).mpg," was downloaded from the appellant's computer, albeit with the additional words "sleeping beauty russian."