Circuit Court for Somerset County
Case No. 19-K-16-010776

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0051

September Term, 2017

TYROM BALLARD

v.

STATE OF MARYLAND

Reed,
Leahy,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 21, 2018

On September 20, 2016, Appellant Tyrom Ballard was charged by criminal information on multiple counts[1] involving sexual encounters with his 16 year-old[2] half-sister, whom we will refer to in this opinion as "Sister." A jury in the Circuit Court for Somerset County convicted appellant of one count for sexual abuse of a child and two counts of incest.[3] On appeal, appellant presents the following two questions:

1. Did the trial court err by admitting evidence of prior bad acts?

2. Was the evidence legally insufficient to sustain appellant's convictions?

For the reasons that follow, we answer "no" to both questions and affirm the judgment of the circuit court.

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[1] At the start of the trial, the trial court summarized the counts: "The Defendant is charged with one count of sexual abuse of a minor. He's charged with two counts of second degree sexual offense. Two counts of unnatural and perverted sexual practice. Five counts of second degree assault. Two counts of fourth degree sexual offense. Three counts of second degree rape. And three counts of incest."

[2] Throughout the trial, counsel and witnesses asserted different ages for appellant and his half-sister at the time of certain incidents. Sister testified that she was born on March 16, 1999, which indicates that she was a minor throughout the events of this case. As acknowledged by the prosecutor and defense counsel, she was 16 years old in June and July of 2015 when the charged incidents allegedly occurred. She was 17 years old when she testified at the trial on January 30, 2017.

The lead investigator assigned to the case determined appellant's date of birth to be August 19, 1993. As acknowledged by appellant, he was 22 years old at the time of the charged incidents in 2015. This indicates that Sister is five to six years younger than appellant, "depending on the time of year."

[3] The counts for which appellant was convicted were: count 1: sexual abuse of a minor (CL § 3-602(b)); count 7: incest (CL § 3-323); count 10: incest (CL § 3-323). There was one additional count of incest for which appellant was not convicted.

The count for sexual abuse of a minor covered appellant's overall "course of conduct," while each of the incest charges corresponded to one of the specific incidents of intercourse testified to by Sister.

FACTUAL AND PROCEDURAL BACKGROUND[4]

Appellant and his father lived with Sister's mother ("Mother") in the home that Mother shared with her parents and her children. Sister, who is the second oldest of Mother's children, and appellant have the same father. When they were children, appellant allegedly engaged with Sister in inappropriate sexual behavior. In 2015, approximately ten years after the alleged childhood incidents, appellant, then an adult, moved back into Mother's home[5] for about a month, during which the charged incidents occurred.

On the day of trial, January 30, 2017, Sister was 17 and appellant was 22 years old. At the start of the trial, the prosecutor indicated her intent to offer evidence of the childhood incidents to explain why Sister did not fight back in 2015, and the defense moved *in limine* to exclude that evidence. The trial court denied the motion.[6]

[4] Because appellant is challenging the sufficiency of the evidence, we include the testimony in some detail and in the general order that it was presented at trial. We present the evidence from the State's perspective as the prevailing party.

[5] In June 2015, Mother and appellant's father no longer lived together. She was living with her boyfriend, her parents and her six children at the home of her parents.

[6] After the trial court denied the motion, defense counsel requested a continuing objection, which the trial court allowed. Before Mother gave details about the incident that she observed, defense counsel made "a proffer on the record so the record during trial is fair as to the motion *in limine*," and the trial court "note[d] [her] continuing objection." During Sister's testimony, defense counsel again "[r]equest[ed] a continuing objection," to which the trial court responded, "you have that."

Mother testified that she was married to but was separated from appellant's father. She testified that appellant is her step-son[7] and had lived in her home as a child. According to her, when appellant was "about between eight or nine" years old and Sister was about five years old, she entered Sister's bedroom and found appellant "humping" Sister with "[t]heir pants . . . down." She "explained to them . . . that that was not allowed," and appellant's father "spanked him." She also testified that during the time appellant lived in her home in 2015, Sister was "fidgety" and "act[ed] out a little bit."

Sister testified that she and appellant have the same father but different mothers and that when they were children, they lived in a home with her maternal grandparents.[8] She further testified that, when she was "about three or four" years old, appellant touched her inappropriately more than five times, including kissing her on the mouth, "pulling [her] pant[s] down," touching her vagina and breasts, "hump[ing]" her, and that there was contact between his penis and her vagina. She did not tell anyone because, when she

[7] Mother's trial testimony reflected the following:
[Prosecutor:] And how do you know [appellant]?
[Mother:] I'm his -- I was his stepmother.
[Prosecutor:] Okay. And when you say was his stepmother are you no longer his stepmother?
[Mother:] Well, me and his father we're still legally married but we're separated.
[Prosecutor:] Okay. So [appellant] is your husband's --
[Mother:] Son.

[8] Sister's trial testimony reflected the following:
[Prosecutor:] And how do you know [appellant]?
[Sister:] He's my brother.
[Prosecutor:] Do you have the same parents?
[Sister:] We have the same father . . .
[Prosecutor:] Do you remember did he live with you from the moment you were born?
[Sister:] Yes, ma'am.

"said [she] was going to tell," appellant threatened to "get [her] in trouble" and to "hurt [her] and [her] family," including "burn[ing] [their] house down." According to Sister, appellant had a "mean" or "strange look in his eyes" that scared her.

Years went by without any face-to-face contact between her and appellant, but they had maintained contact "through letters." In 2015, when she was 16 years old and appellant had moved back to their home, four incidents occurred between her and appellant. The first occurred when appellant entered her bedroom and told her to "suck his dick," to which she complied out of fear. The next day, he told her to "strip" and then had vaginal intercourse with her. On the third occasion, they had vaginal intercourse again. And, "[t]wo weeks after or a week after," she woke up to find appellant having vaginal intercourse with her. She did not fight back on these occasions because she recognized "that look"[9] from when they were children, remembered his threats to her and her family, and was terrified.

After the fourth incident, Sister went to stay at a friend's house and burned appellant's letters because she was "disgusted, ashamed, [and] embarrassed." She told

[9] Sister testified that appellant gave her "that look" before each incident in 2015:
[Prosecutor:] You said that he would give you that look. During those times that you described did he give you that look at any time?
[Sister:] Yes, ma'am.
[Prosecutor:] On each time or which times do you remember?
[Sister:] Each time.
[Prosecutor:] When would he typically give you that look?
[Sister:] When he told me to take off my clothes or when he just came in he would look at me with that look like I already knew what he wanted when he came in.

her mother and her sister what happened and then gave statements to a doctor at T.L.C.,[10] a social worker at the Child Advocacy Center and at her school, and Corporal Jonathan Pruitt from the Maryland State Police.

On cross-examination, she explained that she had initially disclosed only the fourth incident because she was "embarrassed." She further explained that she told the police officer that the first and second incidents were "consensual" because at that time, she did not know what the word meant.

Corporal Jonathan Pruitt, the lead investigator assigned to the case, testified that he interviewed Sister in September 2015. He determined that appellant lived in her home from "approximately June 12th through July 6th of 2015."

Corporal Scott Laird interviewed appellant on December 8, 2015. Corporal Laird told appellant that a third party had reported that he had raped his sister but that their investigation had determined that the sexual intercourse was consensual. That was not the truth, but rather a ruse to trick appellant into admitting in a recorded statement that he had engaged in sexual intercourse with Sister.[11]

[10] T.L.C. is a medical clinic where she had "[a] doctor's appointment."

[11] Corporal Pruitt testified: "I spoke with my partner who was Corporal Laird and due to discussions it was determined that going to talk to [appellant] and accusing him of raping his sister wouldn't be the best bet of getting that information out of [appellant]. So we came with a ruse to say that as a third party I reported the rape. And we had talked to [Sister] who said the sex was consensual. Just to get to -- we wanted [appellant] to admit that he did have sex with his sister. But at no time did [Sister] ever say that she wanted to have sex with her brother." Corporal Laird confirmed his partner's testimony.

When the prosecution rested, appellant's defense counsel moved for judgment of acquittal on all charges. With respect to the incest charges, the defense argued that the State did not establish that Sister and appellant have the same father. The trial judge denied the motion as to all but four counts.[12]

Appellant then testified in his own defense. He acknowledged that Sister is his "second youngest" sister,[13] but he denied that anything sexual had "happened between [him] and [Sister] when [they were] younger" and that he had written letters to her during their years apart. Appellant confirmed that during the "exactly twenty-one days" that he stayed at Sister's residence in 2015, he and Sister engaged in sexual intercourse twice, but that he, and not his sister, was the victim. When she asked him for sex, which he did

[12] Appellant's motion for judgment of acquittal resulted in the dismissal of the last four counts, counts 15 through 18, for "sex offense second degree, unnatural perverted practice, assault in the second degree and fourth degree sex offense."

[13] Appellant testified as follows:

[Defense:] And who else resided there at the time [in 2015]?

[Appellant:] My stepmom, my two little -- well, three little sisters, my two little brothers and my uncle.

* * *

[Defense:] All right. When you say your sisters lived there do you have a sister named [Sister]?

[Appellant:] Yes, I do. She's my second youngest.

* * *

[Prosecutor:] And yet you're telling us today that the reason you didn't report this alleged rape is that you wanted to protect your sister that you had no contact with -- for ten years?

[Appellant:] That's correct. She's still my sister. She's still my blood.

not want, she climbed on top of him[14] and would not get off when he asked. Appellant explained that the reason he did not mention that he was the one who was raped when he was interviewed by the officer in December 2015 was because he did not want Sister to get into trouble: "she's my little sister I want to protect her . . . And by me telling the police that she did it she has to go to jail. And I don't want that to happen."

After appellant testified, defense counsel renewed the motion for judgment of acquittal, which the trial judge denied. The jury convicted appellant on count 1 for sexual abuse of a minor and counts 7 and 10 for incest.[15] The trial judge imposed a prison sentence of 14 years on the sexual abuse count and two concurrent sentences of 10 years each on the incest counts. Appellant filed this timely appeal.

DISCUSSION

Evidence of Prior Bad Acts

Standard of Review

The introduction of evidence of prior bad acts involves consideration of a three-prong test, each prong of which involves a different standard of review. As to the first prong:

[14] Appellant testified that "she climbed on top of me . . . I can't move her. I asked her to get off of me. She said that everything is going to be okay I'm not going to get in trouble . . . Again, she's . . . more than twice my weight. And I can't pick that up."

[15] Appellant was found guilty of incest with regard to the second and third alleged incidents of intercourse testified to by Sister, but not guilty of incest with regard to the fourth alleged incident—where Sister had woken up to appellant having intercourse with her.

> When a trial court is faced with the need to decide whether to admit evidence of another crime—that is, evidence that relates to an offense separate from that for which the defendant is presently on trial—it first determines whether the evidence fits within one or more of the *Ross* [*v. State*, 276 Md. 664 (1976)] exceptions.[16] That is a legal determination and does not involve any exercise of discretion.

State v. Faulkner, 314 Md. 630, 634 (1989). Because "no deference [is] extended" to a trial court's legal determination, we review that determination *de novo*. *See Emory v. State*, 101 Md. App. 585, 604 (1994).

"If one or more of the [*Ross v. State*] exceptions applies," the second prong is "whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Faulkner*, 314 Md. at 634. We review this decision "to determine whether the evidence was sufficient to support the trial judge's finding." *Id.* at 635. In doing so, we look only at "whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue." *Emory*, 101 Md. App. at 622. If there is, the trial court was not clearly erroneous in holding that the prior acts had been proven clearly and convincingly. *See Thompson v. State*, 412 Md. 497, 504 (2010). When the prior acts are not established by clear and convincing evidence, the trial court errs by permitting evidence of them to be admitted. *See Vogel v. State*, 315 Md. 458, 467 (1989).

As to the third prong:

[16] The *Ross v. State* exceptions comprise "a representative list of examples in which evidence has been found to meet the exception to the general rule of exclusion; it is not a laundry list of finite exceptions." *Harris v. State*, 324 Md. 490, 497, 501 (1991).

> The necessity for and probative value of the "other crimes" evidence is to be carefully weighed against any undue prejudice likely to result from its admission.[17] This segment of the analysis implicates the exercise of the trial court's discretion.

Faulkner, 314 Md. at 635 (internal citations omitted). We review that ruling for an abuse of discretion. *See State v. Simms*, 420 Md. 705, 725 (2011). A trial court properly exercises discretion when its ruling is based on "all the considerations which properly enter into the problem," *McCloud v. State*, 317 Md. 360, 367 (1989), and the "special features in the particular case." *Thompson*, 412 Md. at 504.

Because the State "bears the burden of proving guilt beyond a reasonable doubt," *McCloud*, 317 Md. at 363, an error by the trial court in a criminal case mandates a remedy unless the appellate court is able to declare "beyond a reasonable doubt that the trial court's error . . . did not 'influence the verdict' to the defendant's detriment." *Green v. State*, 456 Md. 97, 165-68 (2017) (because the court was "far from convinced beyond a reasonable doubt that [the error] did not influence the verdict to [the defendant's] detriment," it ordered a new trial); *see also Dorsey v. State*, 276 Md. 638, 659 (1976) (when "not persuaded beyond a reasonable doubt that [the error] did not contribute to the guilty verdict . . . a reversal [was] mandated.")

Contentions

[17] "*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." Md. Rule 5-403 (emphasis added).

Appellant, focusing on the relevancy and prejudice prongs of the three-prong test, contends that the trial court erred by admitting evidence of the alleged prior bad acts occurring years earlier when "at the oldest he was ten years old."[18] And, in his view, the testimony that appellant's "look" reminded Sister of his childhood threats "strains credibility."

Concerning relevancy, he argues the earlier acts were the acts of a child and unrelated to the acts with which he was charged. As to prejudice, he contends that the trial judge erred by never weighing the necessity for and probative value of the evidence of these acts against the undue prejudice that was likely to result from their admission. And, even if the judge did the probative value-undue prejudice weighing, appellant argues that it was unduly prejudicial to attribute probative value to the remote actions of children. Therefore, it was an abuse of discretion to admit that evidence.

The State, contending that the evidence was properly admitted, argues that appellant did not contest the relevance of the evidence at trial.[19] The State also contends that it proved appellant's involvement in the prior crimes by clear and convincing evidence, and that appellant did not contest that issue at trial. This evidence was, in the

[18] At trial, defense counsel argued: "I think generally speaking I mean at this point and time of these allegations she's sixteen years old and he is twenty-two I believe. So we're talking twelve years after the alleged incident that occurred when they were younger. He's ten years old at the time those things allegedly occurred . . . they were both very young children at the time and I don't believe it's fair to him to hold him responsible and have the jury be prejudiced against him for acts he did when he was ten years old if in fact he did those things at ten years old."

[19] The State contends that relevancy was not objected to in the trial court. We are satisfied that appellant's motion *in limine* sufficiently preserved the relevancy argument.

State's view, highly relevant because the prior instances of sexual conduct and appellant's threats helped explain why Sister did not fend off appellant's later advances.[20]

As to the prejudice prong, the State contends that the trial court was not required to articulate its weighing of the probative value of the evidence against its prejudicial effect. The State argues that the court did not abuse its discretion when it concluded the probative value of the evidence outweighed its prejudicial effect because it was highly probative of an issue at trial because appellant and Sister advanced different accounts of who initiated the charged sexual activities.

In addition, the State asserts there was no "unfair" prejudice because "the evidence did not influence the jury to disregard evidence relevant to [appellant's] existing charges – the jury found [him] not guilty of the charges requiring non-consent and/or force or resistance and convicted him only of those charges that he admitted to when he testified."[21]

[20] At trial, the prosecutor asserted: "I think this evidence is relevant to their relationship. It explains why the victim in this case . . . who is sixteen years old may not have fended off [appellant] the way that you would expect someone whose sixteen years old to be able to. She will refer several times to the fact that she behaved in the way that she did because he would give her that look. When you ask her to explain that look she says it dates back to when I was a child he would give me that look I knew what that meant . . . So everything sort of relates back to their history when they were children and it explains that relationship they have now. It explains why she only needs one look to understand what that means. Why she's more likely to submit. Why she feels the fear that she feels because it brings her back to when she was much younger of a child. So I think it would to the jurors provide that perspective that it's not just that one incident when she is sixteen it explains her entire behavior."

[21] The State's argument is rooted in *Odum v. State*, where the Court of Appeals held that evidence may be unfairly prejudicial "if it might influence the jury to disregard

Analysis

Evidence of prior bad acts "wholly independent of that for which [the defendant] is on trial, even though it be a crime of the same type," is generally not admissible to prove that the defendant is guilty of the offense for which he or she is on trial. *Ross v. State*, 276 Md. 664, 669 (1976). Evidence of prior bad acts must be examined carefully prior to its introduction. As stated by the Court of Appeals in *Berger v. State*, 179 Md. 410, 414 (1941), "its introduction should be subjected to rigid scrutiny by the court" because of the "misleading probative force and dangerous tendency of testimony of this kind."

There are valid reasons for this exclusionary rule,[22] but there are also multiple exceptions. *See Harris v. State*, 324 Md. 490, 497-98 (1991). The State may present evidence of the defendant's prior bad acts when it is "substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on

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the evidence or lack of evidence regarding the particular crime with which he is being charged." *Odum v. State*, 412 Md. 593, 615 (2010) (citing Lynn McLain, 5 Maryland Evidence, State & Federal § 403:1(b) (2d ed. 2001)). Essentially, evidence is unfairly prejudicial if it "produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case," resulting in verdicts of guilty where the defendant should not have been convicted or verdicts of not guilty where the defendant should have been convicted. *See Odum*, 412 Md. at 615 (citing Joseph F. Murphy Jr., Maryland Criminal Evidence Handbook § 506(B) (3d ed. 1993 & Supp. 2007)).

[22] The main reason is that the defendant "may be convicted only by evidence which shows that he is guilty of the offense charged," or the crime for which he is on trial, "and not by evidence which indicates his guilt of entirely unrelated crimes." *Ross v. State*, 276 Md. 664, 669 (1976). Evidence of other crimes "may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner*, 314 Md. 630, 633 (1989).

propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989); *see also Emory v. State*, 101 Md. App. 585, 602 (1994) (noting that the initial relevancy hurdle "is not simply that the 'other crimes' evidence be technically or minimally relevant to some formal issue in the case other than criminal propensity, but further 1) that the relevance be *substantial* and further still 2) that it be with respect to a *genuinely contested issue* in the case.") (emphasis in original). Circumstances satisfying these "further" requirements are addressed in Md. Rule 5-404(b) and in case law.[23]

Evidence that "show[s] a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial" is one such exception. *Ross*, 276 Md. at 670; *Vogel v. State*, 315 Md. 458, 465 (1989). As the Court of Appeals has explained:

> When evidence of other crimes is admitted because it has special relevance tending to establish, for example, motive, intent, absence of mistake, identity, or common scheme, the evidence is relevant to an issue other than the character or propensity of the accused to commit crime. But the evidence of prior offenses admitted in *Vogel* was admissible to show [that the accused had] a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial. The primary policy consideration underlying the rule against other crimes evidence is that this type of evidence will prejudice the jury against the accused because of the jury's tendency to infer that the accused is a 'bad man' who should be punished regardless of his guilt of the charged crime, or to infer that he committed the charged crime due to a criminal disposition. Yet, in the area

[23] "Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b). *E.g.*, *Ross v. State*, 276 Md. 664, 669-70 (1976) ("evidence of other crimes may be admitted when it tends to establish (1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime on trial.")

> of sex crimes, particularly child molestation, courts have been likely to admit proof of prior acts to show a party's conformity with past conduct.

Acuna v. State, 332 Md. 65, 74-75 (1993) (internal citations and quotations omitted). In other words, evidence concerning prior sex acts of the same type involving the same person has "special" probative value:

> [I]n a sex offense prosecution, when the State offers evidence of prior sexual criminal acts of the same type by the accused against the same victim, the law of evidence already has concluded that, in general, the probative value, as substantive evidence that the defendant committed the crime charged, outweighs the inherent prejudicial effect. The discretion exercised by the trial judge in weighing unfair prejudice against probative value is concerned with special features in the particular case.

Id. at 75. The *Vogel* Court laid out the general requirements for such evidence: "(1) the prosecution is for sexual crimes, (2) the prior illicit sexual acts are similar to that for which the accused is on trial, and (3) the same accused and victim are involved." 315 Md. at 465.

The three elements listed in *Vogel* are satisfied in this case. The charges of incest and sexual abuse of a child are sexual crimes. *See State v. Westpoint*, 404 Md. 455, 461-64, 494 (2008) (where the prior illicit sexual conduct consisted of Westpoint "rubbing" his penis against his daughter's vagina, and the charges against Westpoint in the case were for "put[ting] his finger inside [her] vagina" and putting "his penis on [her] vagina moving up and down."); *Vogel*, 315 Md. at 466 (where the prior illicit sexual conduct consisted of "acts of fellatio . . . by Vogel on the child," and "the charges against Vogel in the case here were bottomed on an act of fellatio practiced by Vogel on the child.")

The similar sexual acts requirement is also met. The prior acts of humping and touching Sister's vagina with his penis are similar to the current charges, just as the prior acts in *Westpoint* and *Vogel* were deemed similar to the charges in those cases. *See* 404 Md. at 461-64; 315 Md. at 463-64. And, the alleged acts involved the same accused and victim.

Appellant's claim that he was the victim and his denial of important aspects of Sister's testimony rendered this a classic "he said, she said" case. The issue was essentially one of credibility, and, therefore, the prior acts evidence had special relevance to a genuinely contested issue in the case – who initiated the sexual encounters. *See Acuna*, 332 Md. at 74-75.

The second prong – whether appellant's involvement in the prior acts was proven by clear and convincing evidence – is not contested by appellant on appeal. But, had it been, we would hold that the trial court was not clearly erroneous in finding that the prior acts were proven by clear and convincing evidence. Sister, who was 17 years old when she testified, identified five occasions over ten years ago when appellant engaged in specific sexual acts. Her mother testified that on one of those occasions, she walked in and saw appellant "humping" her daughter.

In *Acuna*, the four year-old victim testified with particular specificity that there were three occasions on which Acuna "licked her 'birdie.'" *See* 332 Md. at 74. And,

there was no direct corroboration in *Acuna*.[24] The Court of Appeals determined that the trial court's finding the evidence to be clear and convincing was not clearly erroneous. *See id.* at 76. In this case, the testimony of Sister and her mother, if believed, would support a finding by the trial court that the evidence was clear and convincing.

Appellant contends that the trial judge did not weigh the need for and probative value of the evidence of the prior acts against the undue prejudice that was likely to result from its admission. Although the trial judge did not articulate his weighing and balancing of the probative and prejudicial values of the evidence:

> [T]here is a strong presumption that judges properly perform their duties in weighing the probative value and prejudicial effect of so-called other crimes evidence. In this regard, we recognized that trial judges are not obliged to spell out in words every thought and step of logic in weighing the competing considerations.

Ayers v. State, 335 Md. 602, 635-36 (1994) (internal citations and quotations omitted). In *Ayers*, the Court of Appeals held that the trial judge had properly performed the prior bad acts analysis because it was clear that the judge "was fully aware of the governing rule" and recognized that evidence that the defendant was involved in another racial incident a few days before the alleged assault at issue was both probative and prejudicial to the defendant. *See id.* at 634-36.

[24] In *Acuna*, the victim's mother testified that she walked in to the defendant's apartment to hear her daughter's "voice from the bedroom saying, 'No, no, I don't want to do that. We don't do that," and upon entering the bedroom, she saw "her daughter lying back on the bed with Acuna kneeling in front of her. The child's nightgown was pulled up . . . but her underpants were on. Acuna['s] . . . face was six or seven inches from [her] 'private area.'" 332 Md. at 67.

As in *Ayers*, the record in this case supports the trial judge's understanding of the law that he was to apply and the probative value and prejudicial value that he needed to weigh. Defense counsel stated at trial that "the Court as part of the test still must determine . . . whether [the evidence is] more prejudicial than probative to the Defense before admitting those matters to the jury." After the judge and counsel discussed the probative and prejudicial aspects of the prior acts evidence, the judge concluded that the probative value outweighed the prejudicial value "for the reasons stated by the State and for the reasons stated by myself."

Without evidence to the contrary, such as in *Beales v. State*, 329 Md. 263 (1993)[25], the presumption that judges know the law and properly perform their duties will be maintained. The evidence here clearly indicates that the trial court weighed the special probative value of the prior acts against their prejudicial effect.

Appellant also contends that, even if the trial court had weighed the probative value against the prejudicial effect, the latter so outweighed the former that the evidence should not have been admitted. Appellant asserts that these were the acts of children aged ten and younger and that they occurred ten years prior to the charged acts. But age and time do not necessarily alter the probative and prejudicial balance. For example, the victim in *Thompson v. State*, 412 Md. 497, 500-502 (2010), was allowed to testify when

[25] In *Beales*, the Court of Appeals concluded that the "trial court's elliptical remarks do not sufficiently demonstrate that it assessed the relative weights of the probative value and prejudicial danger." 329 Md. at 274. In other words, the trial judge's phrasing indicated he did not know the law, and he failed to consider into the balance the relevant factor of when the prior conduct occurred. *See id.*

she was over 30 years old to an incident of sexual abuse when she had been about five years old and the appellant was 14 years old. Even though Thompson was a juvenile at the time of the uncharged conduct and more than ten years had gone by, as in this case, the Court of Appeals held that the circuit court did not abuse its discretion in finding that the special probative value of that evidence outweighed the danger of unfair prejudice. *See id.* at 502-504; *Acuna v. State*, 332 Md. 65, 75 (1993).

The trial judge in this case was clearly aware of the law and weighed the probative and prejudicial values of the prior bad acts in the context of the facts of the case and the conflicting arguments of the parties. We perceive neither error nor an abuse of discretion in the admission of the prior acts evidence.

But even if the evidence was admitted in error, we are persuaded beyond a reasonable doubt that its admission was harmless in this case. The jury did not convict appellant of the charged crimes which would have required "force or threat of force" on his part. As to the incest charges, appellant acknowledged in his testimony that he had engaged in sexual intercourse with Sister "at least twice," that Sister was the "second youngest" of his "three little sisters," that in "2015 [he] was twenty-two years old," and that he is "six years older than she is." This testimony was not dependent on the prior acts evidence and established each element of proof required for the crimes of incest and sexual abuse of a minor based on incest, unless he did not voluntarily participate in the sexual encounters. At most, the verdict indicates that the jury rejected his argument that

he was the victim in those encounters. In short, we are persuaded beyond a reasonable doubt that the prior acts evidence did not in any way influence the verdict in this case.

Sufficiency of the Evidence

Standard of Review

The standard for appellate review of evidentiary sufficiency is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Fuentes v. State*, 454 Md. 296, 307 (2017); *see also State v. Albrecht*, 336 Md. 475, 478-79 (1994) ("our concern . . . is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt . . . beyond a reasonable doubt.") We view the evidence and all reasonable inferences from it "in the light most favorable to the State." 454 Md. at 307. If there is sufficient evidence, "the lower court would [not be] . . . in error, in a jury trial, in denying a motion for judgment of acquittal." *Williams v. State*, 5 Md. App. 450, 460 (1968). In other words, appellate review of evidentiary sufficiency is essentially a question of whether the State, as a matter of law, met its burden of production. *See Chisum v. State*, 227 Md. App. 118, 125 (2016).

The trier of fact, in this case the jury, "decides which evidence to accept and which [evidence] to reject." *Jones v. State*, 343 Md. 448, 460 (1996). It weighs the credibility of witnesses and resolves any conflicts in the evidence. *See Fuentes*, 454 Md. at 307-308. It may "accept all, some, or none of the testimony of a particular witness."

Correll v. State, 215 Md. App. 483, 502 (2013). And, after choosing what evidence to accept and weighing it, it "draw[s] the inferences reasonably deducible therefrom." *Jones*, 343 Md. at 460.[26]

Contentions

Appellant contends that the evidence was not legally sufficient to sustain his incest convictions because Sister's testimony that they have the same father and his own testimony that she is his sister are not sufficient to establish a sibling relationship. And, because the incest convictions must be reversed, the conviction for sexual abuse of a minor must also be reversed because that conviction was based on the incest convictions. He further contends that, in light of his testimony, the evidence would not permit the trier of fact to find that he had consented to the sexual intercourse.

The State, noting that the jury is entitled to weigh the credibility of witnesses and "was not required to credit [appellant's] testimony that he did not consent," contends that the evidence is legally sufficient to sustain appellant's convictions and that all three convictions should be affirmed. In its view, the evidence, viewed in the light most favorable to the State, was sufficient to support findings that: (1) appellant and Sister engaged in sexual intercourse twice; (2) appellant is a "family member"; and (3) Sister

[26] *See also State v. Smith*, 374 Md. 527, 557 (2003) (noting that it does not matter "whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference."); *State v. Albrecht*, 336 Md. 475, 479 (1994) ("the reviewing court is not to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.'"); *Allen v. State*, 158 Md. App. 194, 249 (2004) ("the limited question before an appellate court 'is not whether the evidence should have or probably would have persuaded the majority of fact finders.'")

was a minor at the time. Therefore, the evidence was sufficient to find appellant guilty beyond a reasonable doubt for both incest and sexual abuse of a child.

Analysis

In a jury trial, the defendant, under Rule 4-324(a), must "move for a judgment of acquittal, specifying the grounds for the motion," as a prerequisite for appellate review. *Whiting v. State*, 160 Md. App. 285, 308 (2004). Appellant moved twice for a judgment of acquittal as to the charges of incest at his trial, once at the close of the State's case,[27] and again at the close of all evidence.[28] Although appellant did not explicitly object to the charge of sexual abuse of a minor in these motions,[29] defense counsel's incest argument that there was not "any testimony as to who [Sister's] father was" impliedly attacked appellant's alleged status as a "family member" under the charge for sexual

[27] At the close of the State's case, defense counsel stated: "With regard to the count of incest I know there have been testimony about them being half brother and sister. I know there was testimony that my Client was her mother's step child. I don't know if there was any testimony as to who her father was." The Court responded, "[y]eah, there was. Sure there was."

[28] At the close of all the evidence, defense counsel reiterated: "I renew my motion for judgment of acquittal. I would incorporate any argument previously made. (Inaudible). I don't believe anything additional other than additional testimony that it was (inaudible) by force." The Court responded, "Well, I guess that is that's what cases boil down to I think. That's what the jury has to decide is who got raped and was it rape. It's not for me to decide. So it's up to the jury to decide. Okay."

[29] At the close of the State's case, defense counsel objected to counts 15 through 18 for "[s]ex offense second degree, unnatural perverted practice, assault in the second degree and fourth degree sex offense," which the trial court dismissed. Defense counsel also objected to the remaining counts of "sex offense in the second degree," "sex offense in the fourth degree," "rape in the second degree," and "the count of incest," which were denied. In the motion for judgment of acquittal at the close of all the evidence, defense counsel only referenced her earlier arguments.

abuse of a minor. We are satisfied that this permits appellate review of the sufficiency of the evidence for that charge, as well.

Because the conviction for sexual abuse of a minor was predicated on the incest findings, we will address the incest charges first. To prove incest,[30] proof of both penetration and parentage are required. *See Scott v. State*, 2 Md. App. 709, 712 (1968). § 3-323(a) of the Criminal Law Article ("CL") states that "[a] person may not knowingly engage in vaginal intercourse with anyone whom the person may not marry under § 2-202 of the Family Law Article." Md. Code Ann. (2002, 2012 Repl. Vol.). § 2-202 of the Family Law Article ("FL") says, in relevant part, that "an individual may not marry the individual's . . . sibling[.]" Md. Code Ann. (1984, 2012 Repl. Vol., 2017 Supp.).

In *Tapscott v. State*, 343 Md. 650, 657-58 (1996), the Court of Appeals held "that 'brother' and 'sister' as used in § 2-202 of the Family Law Article include half-blood siblings as well as full blood siblings." The Court noted that FL § 2-202 is virtually the same as its English-based predecessor, and because English courts had interpreted their marriage prohibitions to include half-blood relationships since 1540, FL § 2-202 should be interpreted that way. *Id.* at 658-60. The Court also held that half-blood relationships did not need to be specifically stated in the Family Law statute as they were in § 1-204 of

[30] The jury instructions regarding incest stated: "The Defendant is charged with the crime of incest. In order to convict the Defendant of incest the State must prove, one, that the Defendant had vaginal intercourse with [Sister], two, that [Sister] is the Defendant's half sister, and, three, that at the time of the act the Defendant knew that [Sister] was his half sister. Vaginal intercourse means the penetration of the penis into the vagina. The slightest penetration is sufficient and the emission of semen is not required."

the Estates and Trusts Article[31] because those statutes "evolved from different systems with different underlying rules." *See id.* at 660-61.

In ordinary usage, "sibling" includes half-blood relationships. For example, a sibling is "[e]ach of two or more children of *a common parent* or parents," according to the Oxford English Dictionary and "one of two or more individuals having *one common parent*" according to Merriam Webster. *Sibling*, Oxford English Dictionary (2d ed. 1989) (emphasis added); *Sibling*, Merriam-Webster.com Dictionary (emphasis added).

Case law involving the crime of incest distinguishes between victims and accomplices[32] because an accomplice's testimony requires corroboration. *In re Anthony W.*, 388 Md. 251, 264 (2005) ("The longstanding law in Maryland is that a conviction may not rest on the uncorroborated testimony of an accomplice."). The Court of Appeals stated:

> That the status of a participant is entirely a factual one is demonstrated by those cases which hold that the woman will be an accomplice where she freely and willingly consents to the sexual union. Where, however, a passive participant in an incestuous relationship does not freely consent to copulation, and where the sexual union is achieved by force, threats or undue influence on the part of the aggressive participant, the passive participant is not an accomplice, but a victim.

[31] "A relative of the half blood has the same status as a relative of the whole blood of the same degree." Md. Code Ann. (1974, 2017 Repl. Vol.), Est. & Trusts Art., § 1-204.

[32] "An accomplice is one who knowingly, voluntarily, and with common criminal intent with the principal offender, unites with him in the commission of the crime either as a principal or as an accessory before the fact." *Burley v. State*, 5 Md. App. 469, 471-72 (1968).

Lusby, 217 Md. 191, 199-200 (1958) (internal citations omitted). The burden of proving that the witness actually consented and thus was an accomplice is "upon the party alleging it [i.e., the defendant]." *Id.* at 201. Appellant in this case did not argue at trial that his sister consented to intercourse but rather that she initiated it and he did not consent. As stated above, the jury rejected that argument.

Penetration is not contested because both Sister and appellant testified that they had engaged in sexual intercourse twice. Additionally, her testimony as to the shared parentage was corroborated by her mother and acknowledged by appellant. The State did not need to produce "evidence of greater reliability, such as a birth certificate or other documentary evidence." *See* 217 Md. at 197. In short, the evidence was sufficient to convict appellant of incest.

The charge of sexual abuse of a minor[33] involves three elements of proof. First, the acts of a defendant, to qualify as sexual abuse, must involve "sexual molestation or

[33] The jury instructions regarding sexual abuse of a minor stated: "The Defendant is charged with the crime of child sexual abuse. Child sexual abuse is sexual molestation or exploitation of a child under eighteen years of age caused by a family member of a child. In order to convict the Defendant of child sexual abuse the State must prove, one, that the Defendant sexually abused [Sister] by rape, *incest*, other sexual offense unnatural or perverted sexual practices. Two, that at the time of the abuse [Sister] was under eighteen years of age. And, three, that at the time of the abuse the Defendant was a family member of [Sister]. Family member means a relative of the child by blood, adoption or marriage." (emphasis added).

The prosecutor argued to the jury: "Sexual abuse of a minor a lot of times is charged over the course of a period of time because it's hard sometimes for victims to be able to tell exactly how many times these things happen" and thus "[s]exual abuse of a minor can be [a] course of conduct. It can happen in several different ways. It doesn't

exploitation of a minor, whether physical injuries are sustained or not." CL § 3-602(a)(4)(i). Maryland case law does not define or explain "sexual molestation," but Black's Law Dictionary defines it as the "act of making unwanted and indecent advances to or on someone, esp. for sexual gratification." *Sexual Molestation*, Black's Law Dictionary (10th ed. 2014). "Exploitation" requires that the defendant "took advantage of or unjustly or improperly used the child for his or her own benefit." *Degren v. State*, 352 Md. 400, 426 (1999). By statute, sexual abuse includes, but is not limited to, "incest; rape; sexual offense in any degree; sodomy; and unnatural or perverted sexual practices." CL § 3-602(a)(4)(ii); *see also Tribbit v. State*, 403 Md. 638, 657 n.14-15 (2008) ("The general terms . . . precede the specific list of items. This provides even further indication that the Legislature intended the list of items in § 3-602(a)(4)(ii) to be illustrative.")

Second, the victim must have been a minor at the time of the charged conduct. And, third, the defendant must be: (1) "a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor" or (2) "a household member *or* family member." CL § 3-602(b)(1)-(2) (emphasis added). A household member is "a person who lives with or is a regular presence in a home of a minor *at the time of the alleged abuse.*" CL § 3-601(a)(4) (emphasis added). A family member is "a relative of a minor by blood, adoption, or marriage." CL § 3-601(a)(3). Household and family members need not have a relationship of "care or custody or responsibility for the supervision of [the] minor." CL § 3-602(b)(1)-(2).

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have to be one incident. So a course of conduct meaning happening several times that can all be encompassed into that one count of sex abuse of a minor."

The evidence was sufficient to convict appellant of incest, which satisfies the first element for the charge of sexual abuse of a minor. And, the second element – that the victim was a minor – is uncontested and clearly met. Sister was sixteen years old when the charged conduct occurred. To the extent appellant is impliedly challenging that he was a "family member," that argument also fails. As her half-brother, he was a "relative . . . by blood" and thus a family member. *See* CL § 3-601(a)(3). And, he was also a household member at the time of the alleged abuse. *See* CL § 3-601(a)(4). The evidence was sufficient for the jury to find that all three elements of the crime of sexual abuse of a minor were satisfied beyond a reasonable doubt.

JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.