Circuit Court for Baltimore City
Case No. 117236002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 252

September Term, 2018

SAMUEL BEVERLY, JR.

v.

STATE OF MARYLAND

Meredith,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: October 8, 2019

Appellant, Samuel Beverly, Jr., was convicted by a jury in the Circuit Court for Baltimore City of child sexual abuse, third-degree sex offense, and second-degree assault.[1] On appeal from his convictions, appellant presents the following questions for our review, which we have rephrased slightly:

1. Did the trial court abuse its discretion in permitting the State to amend the charging document prior to trial and over defense counsel's objection?

2. Did the trial court abuse its discretion in permitting the State to argue to the jury that the defense had failed to adduce evidence relating to May 11, 2017?

3. Did the trial court abuse its discretion in declining to propound appellant's requested *voir dire* questions?

Finding no error, we affirm.

BACKGROUND

Appellant was accused of sexually assaulting J.R., his ex-girlfriend's daughter, after picking her up from an after-school program in May 2017.

The evidence produced at trial showed that appellant and Ms. R., J.R.'s mother, were involved in an "off and on" romantic relationship for approximately thirteen years. J.R. was born in 2007. She has known appellant since birth, though he is not her biological father. Appellant and J.R. shared a father/daughter relationship and she referred to him as "Sam" or "Dada."

[1] Appellant was found not guilty of the charge of second-degree rape.

J.R., age 10, testified that sometime around Mother's Day of 2017, appellant raped her. J.R. stated that appellant picked her up from her after-school program in his black car and agreed to stop for food at Chick-Fil-A on the way home. According to J.R., appellant then drove to an alley, stopped the car, and entered the backseat of the car where J.R. was sitting. Appellant unbuckled his belt, told J.R. to take her pants down, turned her on her stomach and placed his penis in her vagina. J.R. stated that appellant told her that if she told anyone about what had happened, he would hurt her mother. Appellant then drove her home without making any stops. J.R. testified that appellant did not pick her up from school again after the day he raped her. On cross-examination, J.R. recalled telling a detective who had interviewed her that the assault occurred on May 9, 2017. J.R. denied telling the detective that appellant brought her to Chick-Fil-A after the assault.

On May 22, 2017, Dominique White, a counselor in J.R.'s after-school program, noticed that J.R. seemed unusually sad. When she asked J.R. if she was okay, J.R. reluctantly responded that a man who had regularly picked her up from the after-school program had taken her to an alley during her car ride home. When Ms. R. arrived to pick up J.R., Ms. White told her that J.R. needed to tell her something that should be discussed in private.

J.R. and Ms. R. proceeded outside to their car, where J.R. stated to Ms. R. that "Dada raped me." Ms. R. drove J.R. directly to the hospital, where J.R. was examined by Dr. Wendy Lane, a child abuse pediatric specialist. Dr. Lane testified that she examined J.R. and found no evidence or injury or infection to her vaginal area, though she explained that

her findings did not negate the possibility that injuries had been suffered and since healed.[2] The State introduced the after-school program's attendance sheets showing that J.R. had attended the program on May 9 and 11, 2017, and that appellant had picked her up from the program on both dates.

Baltimore City Police Detective Lakeia Jones of the Child Abuse Unit testified that she interviewed J.R. at the hospital on May 22, 2017. According to Detective Jones, J.R. had stated that she was abused after she was picked up from her after-school program, and then taken to Chick-Fil-A, before she was dropped off at home.

Appellant testified that he and Ms. R. had a thirteen-year relationship, which ended on January 1, 2017. Appellant stated that he had provided financial support to Ms. R. and J.R. and picked up J.R. from her after-school program on occasions when Ms. R. worked late. Following appellant's break-up with Ms. R. on January 1, 2017, he continued to support her, including paying for repairs to her car and buying clothes for J.R. Appellant stated that between April and May of 2017, he had told Ms. R. that he would no longer support her, which had upset Ms. R.

Appellant testified that on May 9, 2017, he left work at 4:40 p.m. and picked up J.R. at her after-school program shortly after 5:00 p.m. Appellant stated that he owned a red Chevy Suburban SUV and a black Toyota Avalon sedan. He recalled that on May 9, 2017, he had driven the red Suburban to pick up J.R. Appellant stated that he had driven J.R. to

[2] Dr. Lane indicated that she examined J.R. on May 23, 2017. J.R.'s medical records, introduced as State's Exhibit 1, show that J.R. was examined by Dr. Lane on May 22, 2017.

a Subway restaurant, bought her a meatball sub, and dropped her off at home before 6:00 p.m. Appellant denied driving J.R. to an alley and raping or abusing her.

Appellant introduced copies of his cell phone records, which, he argued, showed that during the time that he was in the car with J.R. on May 9, 2017, he was calling and texting about his plans for the evening, specifically, mentoring a child and picking up his son from college. Appellant testified that on May 9, 2017, he was 6'2" tall, weighed 360 pounds, and could not fit in the back seat of his Toyota.

As noted, the jury convicted appellant of child sexual abuse, third-degree sex offense, and second-degree assault.

DISCUSSION

I. Amendment of the Charging Document

Appellant contends that the court abused its discretion in permitting the State to amend, on the first day of trial, the date of the alleged offense set forth in the charging document, resulting in actual prejudice because he had focused his trial preparation on May 9, 2017, the date specified in the indictment.

The State responds that the trial court acted within its discretion in permitting amendment of the charging document because the amended date of the offense did not change the character of the offense charged. The State also contends that appellant suffered no unfair surprise by the amendment because the State's initial disclosures, which it provided to appellant months before trial, included records indicating that the offense may have occurred on May 9 or May 11, 2017.

Maryland Rule 4-204 governs the amendment of charging documents:

> 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.

In defining "character of the offense charged" under Rule 4-204, we stated in *Thompson v. State*, that "'[m]atters relating to the character of the offense are those facts that must be proved to make the act complained of a crime.' Consequently, the only change to an indictment that requires the consent of the parties is one that would alter the elements of the crime charged." 181 Md. App. 74, 98-99 (2008), *aff'd*, 412 Md. 497 (2010) (quoting *Tapscott v. State*, 106 Md. App. 109, 134 (1995). We further explained 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.'" *Id.* at 99 (quoting *Manuel v. State*, 85 Md. App. 1, 18-19 (1990)) (concluding that expanding the time of a conspiracy was a matter of form). *See also Boyd v. State*, 79 Md. App. 53, 68 (1989) (holding that amendment of an indictment to change the dates covering the beginning and end of the charged criminal conspiracy did not alter the essential elements of the offense), *aff'd*, 321 Md. 69 (1990).

The Court of Appeals has recognized that "the exact date of the offense is not an essential element and is not constitutionally required to be set forth [in the indictment]," and, therefore, "the time of an offense stated in an indictment need not be precise." *Thompson v. State*, 412 Md. 497, 517-18 (2010) (quoting *State v. Mulkey*, 316 Md. 475,

482 (1989)). Moreover, "[i]t is well established that the State is not confined in its proof to the date alleged in the indictment." *Tucker v. State*, 5 Md. App. 32, 35 (1967).

The original indictment alleged that the charged offenses had occurred "on or about May 9, 2017." On December 22, 2017, two weeks prior to trial, the State moved to amend the date on the charging document to "on or about May 9-11, 2017." On January 3, 2018, the defense filed an opposition to the motion to amend. Before jury selection on January 8, 2018, the court heard argument on the motion to amend and granted it, finding that the proposed amendment "relate[d] to form rather than substance."

Appellant acknowledges that ordinarily, altering the date of the offense does not change the character of the offense. Relying on *Burkett v. State*, 5 Md. App. 211 (1968), appellant contends that there is an exception to the rule where, as here, the amendment results in an actual prejudice. In *Burkett*, this Court held that where there are multiple crimes – in that case possession of burglar's tools on two separate occasions, "it is essential that the indictment inform the accused prior to trial which crime he is called upon to defend." *Id*. at 221. Here, unlike *Burkett*, there was no confusion as to which crime appellant was called upon to defend because he was charged with a crime that was alleged to have occurred on a single occasion.

In this case, the amendment of the date of the charged offenses was one of form, not substance, as the amendment did not change an essential element of the offenses. *See Holbrook v. State*, 133 Md. App. 245, 259-60 (2000) (determining that changing the date on which an alleged threat occurred was a matter of form and not substance). Moreover, the record shows that the defense was on notice of the possible dates of the alleged offense

prior to trial based on the sign-out sheets for J.R.'s after-school program for May 9 and 11 and the statements of J.M. and Ms. M., which were included in the State's initial disclosures produced to the defense on September 13, 2017. Appellant has not shown that any prejudice resulted from the amendment of the date of the charged offenses in the indictment. Consequently, the trial court did not abuse its discretion in permitting the State to amend the indictment.

II. State's Rebuttal Argument

Appellant contends that the trial court erred in permitting the prosecutor to argue in rebuttal that the defense had failed to adduce evidence relating to May 11, 2017. He argues that the prosecutor's comment about his failure to introduce phone records for May 11, 2017 resulted in an improper shifting of the burden of proof. He further contends that State's remarks were "particularly inappropriate" because "the jury was unaware that May 11 had only on the eve of trial become relevant, and exploited that fact by challenging the defense to put on evidence regarding that date."

The State argues that the trial court acted within its discretion in controlling the scope of the prosecutor's rebuttal argument. Specifically, it argues that because the defense elected to put on a case and introduce evidence corroborating appellant's version of events of May 9, the prosecutor was permitted to comment on the lack of corroborating evidence for May 11 without shifting the burden of proof to appellant. The State further contends that the prosecutor's remark about May 11 was a fair comment on the evidence given that the defense had ample notice that May 11 was a potential date on which the offense may have occurred.

J.R. testified that appellant raped her on a date around Mother's Day of 2017 and that appellant did not pick her up from school again after the date he raped her. J.R. also recalled telling a detective who had interviewed her that the rape occurred on May 9, 2017. The after-school program's attendance sheets showed that J.R. had attended the after-school program on May 9 and 11, 2017, and appellant had picked her up from that program on both dates.

Appellant denied raping J.R., and testified that he was on his cell phone talking and texting during the ride with J.R. He introduced cell phone records for May 9, 2017 to corroborate his testimony about his activities that day. On cross-examination, the prosecutor asked appellant if he had picked up J.R. from her after-school program on May 9 and May 11, 2017, and appellant confirmed that he had picked her up on both dates. In closing argument, the defense directed the jury to consider the evidence supporting appellant's account of events on May 9, specifically the after-school sign-out sheet for May 9 and appellant's phone records for May 9, which, she argued, showed that "throughout this very narrow window" appellant "is either on the voice phone or texting within ten minutes."

In rebuttal, the prosecutor sought to discredit appellant's evidence for May 9 by pointing out that the offense could have happened on May 11, as that was the last day that appellant picked J.R. up from the after-school program. The prosecutor stated, "We don't know if he was on the phone on the 11th. We don't know if he wasn't on the phone on the 11th. He didn't present any evidence about the 11th."

Generally, parties are permitted "'liberal freedom of speech'" during closing arguments and "'may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Whaley v. State*, 186 Md. App. 429, 452 (2009) (quoting *Spain v. State*, 386 Md. 145, 152 (2005)). In rebuttal, a prosecutor is permitted to respond to the arguments made by defense counsel during closing argument. *See Degren v. State*, 352 Md. 400, 433 (1999) ("[P]rosecutors may address during rebuttal issues raised by the defense in its closing argument.") (citing *Blackwell v. State*, 278 Md. 466, 481 (1976)).

We recognize that a prosecutor cannot comment on the defendant's failure to produce evidence to refute the State's evidence where it could result in an impermissible shift of the burden of proof to the defendant by referencing the defendant's right not to testify. *Mitchell v. State*, 408 Md. 368, 392 (2009) (citing *Eley v. State*, 288 Md. 548, 555 n.2 (1980)). Where a defendant elects to testify, however, it is not improper for the State to comment on the lack of evidence corroborating the defendant's version of events. *Marshall v. State*, 213 Md. App. 532, 540 ("Commentary on the lack of corroborating witnesses is permissible when a defendant elects to testify."), *cert. denied*, 436 Md. 329 (2013); *Mines v. State*, 208 Md. App. 280, 300 (2012) ("[w]hile 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") (quoting *U.S. v. Boulerice*, 325 F.3d 75, 86-87 (1st Cir. 2003)) (internal citation omitted).

Here, one of the defense's alibi theories was that appellant was talking on his phone during the car ride when the offense in question took place. In support of his defense, appellant offered his cell phone records detailing his phone activity on May 9, 2017. Appellant acknowledged in his testimony that he also picked up J.R. on May 11, 2017. Appellant did not introduce any phone records showing his phone activity on May 11, 2017.

In her rebuttal, the prosecutor argued that appellant's phone records did not support his alibi because during the time period that appellant drove J.R. home on May 9, the records showed that he was on the phone for ten minutes of the sixty-minute ride. The prosecutor pointed out that the offense could have happened on May 11, as that was the last day that appellant picked J.R. up from aftercare, and appellant did not introduce any records detailing his phone activity on May 11. In this context, the prosecutor's comment challenging the credibility of appellant's defense was a fair comment on the evidence introduced by appellant in support of his defense. *See Williams v. State*, 216 Md. App. 235, 256 (2014) (where "[t]he actual evidence in the case did not support many of the statements the defense made or the counter-narrative that the defense was suggesting[,]" it was not improper for the State to point that out without shifting the burden of proof to appellant to prove his innocence). We conclude that the prosecutor's remarks did not result in an improper shifting of the burden of proof to appellant and the trial court did not abuse its discretion in overruling appellant's objection to the prosecutor's remarks.

The timing of the amendment of the charging document does not change our conclusion that the prosecutor's remarks in rebuttal were not improper. The State's filing

of the motion to amend the charging document two weeks prior to trial provided sufficient notice to appellant of the State's position that, based on the documents produced in the State's initial disclosures, the offense occurred on either May 9 or May 11, 2017. Appellant's suggestion that notice of the amendment was given "on the eve of trial" is disingenuous.

III. Voir Dire

Appellant contends that the circuit court erred in refusing to propound the following proposed *voir dire* questions:[3]

> 11. Would any prospective juror give more weight to the testimony of an alleged victim [than] a civilian defense witness merely because the witness was a child at the time of the alleged offense(s)?
>
> 12. In considering the credibility or believability of a witness, the members of the jury are the sole judges. Does any member of the prospective jury panel feel that he or she would be unable to judge whether or not a witness is being truthful or not?
>
> 13. Is any prospective juror of the opinion that simply because a defendant stands charged with a crime that he necessarily must have done something wrong?
>
> 14. Would any juror consider an indictment as anything more than simply a charge in a case?

Prior to jury selection, the trial court ruled that it would not give appellant's proposed *voir dire* question numbers 11 through 14, and defense counsel did not object to

[3] Appellant's proposed *voir dire* questions 11, 12, 13 and 14 are adopted from his brief as appellant's proposed *voir dire* questions were not included in the record. In this particular case, because we conclude that appellant waived his challenge to the court's refusal to ask these questions, it is not necessary for us to review the missing *voir dire* questions.

the court's ruling. Once the court completed review of defense counsel's remaining proposed *voir dire* questions, the court asked counsel, "Is there anything that either of you want to put on the record with regard to [*voir dire*]?" Defense counsel responded, "Not at this time, Your Honor."

The State contends that appellant waived his challenge to the trial court's ruling when defense counsel affirmatively represented that appellant had no objection to the court's *voir dire*. We agree.

Rule 4-323(c), governing objections made during jury selection and *voir dire*, provides that, an objection to a trial court's ruling regarding *voir dire* is preserved for appellate review if, "at the time the ruling or order is made or sought," the complaining party "makes known to the court the action that the party desires the court to take or the objection to the action of the court." A defendant who fails to object to the court's refusal to read a proposed question cannot "complain about the court's refusal to ask the exact question he requested." *Gilmer v. State*, 161 Md. App. 21, 33, *vacated in part on other grounds*, 389 Md. 656 (2005). Where a party not only fails to object to the court's refusal to give the requested *voir dire* questions, but also affirmatively advises the court that there is no objection to the *voir dire* as given, the party's affirmative statement constitutes an explicit waiver of the objection. *Brice v. State*, 225 Md. App. 666, 679 (2015), *cert denied*, 447 Md. 298 (2016) ("Waiver 'extinguishes the waiving party's ability to raise any claim of error based upon that right.'") (quoting *Brockington v. Grimstead*, 176 Md. App. 327, 355 (2007)).

In the present case, appellant both failed to object to the court's refusal to ask his requested *voir dire* questions, and affirmatively waived the issue when defense counsel represented to the court that she did not want to put anything on the record regarding *voir dire*. Because appellant waived his challenge to the trial court's refusal to ask his proposed *voir dire* questions, that issue cannot be reviewed on appeal. *See State v. Rich*, 415 Md. 567, 580 (2010) (explaining that waived rights are not reviewable on appeal).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.