Circuit Court for Worcester County
Case No. C-23-CR-20-118

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 276

September Term, 2022

DWAYNE AARON TURLEY

v.

STATE OF MARYLAND

Nazarian,
Tang,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: October 13, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

After a jury trial in the Circuit Court for Worcester County on December 13, 2021, Dwayne Aaron Turley was convicted on one count each of sexual abuse of a minor and sexual offense in the third degree. Mr. Turley argues on appeal that the trial court limited his attempts to cross-examine two of the State's witnesses improperly and permitted the State improperly to shift the burden of proof in its closing argument. We affirm the convictions.

I. BACKGROUND

In 2019, Mr. Turley's niece, E, revealed that Mr. Turley had assaulted her sexually at his home in Pocomoke City on August 18, 2012. At the time of the incident, E was a minor, but the incident was not disclosed to outside parties either by Mr. Turley or by E until December 2019, when E disclosed to mental health professionals during a voluntary hospital stay that she had been sexually abused by an adult male when she was eleven years old. She was diagnosed with PTSD as a result of "sexual abuse trauma," but didn't report the abuse to anyone at that time. On June 1, 2020, though, E disclosed the abuse to her parents, who convinced her to file a police report. An investigation began and Mr. Turley was interviewed on June 8, 2020 by Detective Maykel Suarez. Mr. Turley denied the allegations.

On December 13, 2021, Mr. Turley was tried in front of a jury on one count each of sexual abuse of a minor and third-degree sexual offense. Mr. Turley and E both testified at the trial and detailed what they remembered about the incident.

Both E and Mr. Turley testified that in the early hours of the morning, Mr. Turley was viewing a pornographic video alone in his personal computer room. E had spent the night at the Turleys' house, which she and her sister had done on several occasions before. She wandered into the computer room in the hope of being allowed to play a game and interrupted Mr. Turley's adult film viewing. Mr. Turley immediately turned the video off. E then walked around to the front of the desk chair and climbed into Mr. Turley's lap, an action neither E nor Mr. Turley found unusual given their familial relationship.

From that point, though, their accounts of the incident diverge significantly. According to E, Mr. Turley reached his hand into her pants and fiddled with her underwear. She stated that this made her uncomfortable enough to move off his lap and into a nearby chair. E then testified that Mr. Turley put her hand on his penis:

> [STATE]: And then what happens as you're sitting in the wooden chair?
>
> [E]: He takes my right hand and puts it on his penis.
>
> * * *
>
> [STATE]: Can you tell us now if you recall whether or not his penis was erect?
>
> [E]: It was.
>
> [STATE]: And what was he doing with your hand?
>
> [E]: There was a slight jerking motion.
>
> * * *
>
> I pulled my hand away. And he looked at me and he said sorry. And I walked out of the room, washed my hands.

On cross-examination, Mr. Turley's counsel sought to question E about why she did not provide her medical records to the police to corroborate her statement that she disclosed

the sexual abuse to mental health professionals. The court sustained the State's objections:

> [COUNSEL FOR MR. TURLEY]: Now, when you spoke to the detectives, you told them that you made the disclosure to the psychiatric hospital, correct?
>
> [E]: Like, I admitted myself?
>
> [COUNSEL FOR MR. TURLEY]: Okay. You told the detectives that you had admitted yourself to a psychiatric hospital and you disclosed the abuse to them, correct?
>
> [E]: Yes.
>
> [COUNSEL FOR MR. TURLEY]: They never asked you to sign a release so they could look at the records, did they?
>
> [STATE]: Objection.
>
> THE COURT: Sustained.
>
> [COUNSEL FOR MR. TURLEY]: You never provided them with those records showing that you disclosed to the hospital, did you?
>
> [E]: No.
>
> [STATE]: Objection.
>
> THE COURT: Sustained.

Cross-examination of Detective Suarez was limited similarly, with the court sustaining objections to questions pertaining to healthcare "mandatory reporting laws." Mr. Turley otherwise was permitted to question E about why she didn't report the incident for many years.

Mr. Turley testified in his own defense and denied ever putting E's hand on him:

> [COUNSEL FOR MR. TURLEY]: Okay. At any point did you expose yourself to her?
>
> [MR. TURLEY]: No.
>
> [COUNSEL FOR MR. TURLEY]: Did you put her hand in your lap?
>
> [MR. TURLEY]: No.

> [COUNSEL FOR MR. TURLEY]: Did you put her hand on your penis?
>
> [MR. TURLEY]: No.

Mr. Turley's defense was that "E lied about this incident to mend her relationship with her parents by creating a common enemy in Mr. Turley." In his closing argument, in an effort to "test[] [E's] claims of previous reports," Mr. Turley questioned why the State did not present E's medical records as evidence and why the mental health professionals to whom she first reported her sexual abuse were not there to testify. Defense counsel argued in closing that "we don't know what happened at that hospital. We're not entitled to those records. . . . We have no medical records to show what [E] actually said."

The State responded in its rebuttal closing that Mr. Turley could have subpoenaed those records and asked the same questions in preparation for trial if he felt that they were vital to his defense:

> Where are the medical records? Where are all the medical personnel? First of all, [E] has a privilege. That is a privilege that is—
>
> [COUNSEL FOR MR. TURLEY]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [STATE]: We have no idea what hospital she went to. We have no idea where the hospital was. We have no idea who she spoke to, what the mandating reporting laws were, and whatever she said and gave [in] that statement. I don't know. But I'll tell you what I do know, the defense could have asked those same questions.
>
> [COUNSEL FOR MR. TURLEY]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [STATE]: It's much easier to stand up here and point at all of the things that the State didn't do than to actually ask those questions themselves.

The State emphasized to the jury that it had the burden of proof, but not the burden to predict and respond to all potential defense theories:

> However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. In other words, I don't have to provide explanations for why her sister isn't on the stand or all of these alternative theories that the defense has just thrown out here. Nor is the State required to negate every conceivable circumstance of innocence.

The jury found Mr. Turley guilty of one count of sexual abuse of a minor and one count of sexual offense in the third degree. He was sentenced to fifteen years' imprisonment for the first count (with 658 days' credit for time served), two years' imprisonment consecutive to the first sentence for the second count, and lifetime registration as a sexual offender.

Mr. Turley appeals. We discuss additional facts as necessary below.

II. DISCUSSION

Mr. Turley presents two issues for our review, which we have reworded:[1] *first*,

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[1] Mr. Turley phrased the Questions Presented as follows:

> 1. Did the trial court err in precluding Mr. Turley from exercising his Sixth Amendment right of confrontation through cross-examination?
> 2. Did the trial court err in permitting the prosecutor to argue facts not in evidence, to mislead the jury, and to improperly shift its burden to the defense? **(ANT 2)**

The State briefed its Questions Presented as follows:

> 1. Did the trial court properly manage the defense's cross-examination of the victim and Detective Suarez?
> 2. Did the trial court act within its discretion in controlling the State's rebuttal closing argument? **(LEE 1)**

whether the trial court abused its discretion in limiting defense counsel's cross-examination of E and Detective Suarez relating to the release of her personal medical records and, *second*, whether the trial court abused its discretion in permitting the State to argue in closing that Mr. Turley had the opportunity and means to subpoena E's personal medical records if he felt that they were relevant to his defense.

We review for abuse of discretion a trial court's decisions about the scope of a cross-examination or closing argument. *Thomas v. State*, 143 Md. App. 97, 109–10 (2002) ("The conduct of the trial 'must of necessity rest largely in the control and discretion of the presiding judge,' and an appellate court should not interfere with that judgment unless there has been error or clear abuse of discretion." (*quoting Wilhelm v. State*, 272 Md. 404, 413 (1974)); *see also Grandison v. State*, 341 Md. 175, 207, 225 (1995). A court abuses its discretion only "where no reasonable person would take the view adopted by the [trial] court." *Fontaine v. State*, 134 Md. App. 275, 288 (2000) (*quoting Metheny v. State*, 359 Md. 576, 604 (2000) (internal quotation omitted)).

A. The Trial Court Did Not Abuse Its Discretion To Limit Mr. Turley's Cross-Examination Of E And Detective Suarez.

Mr. Turley argues that the trial court abused its discretion in limiting his cross-examination of E and violated his constitutional right to confront the witness. We see no abuse of discretion here.

Under both the Confrontation Clause of the U.S. Constitution and Article 21 of the Maryland Declaration of Rights, Mr. Turley has the right to confront witnesses against him through cross-examination. U.S. Const. amend. VI. Beyond that constitutional threshold,

though, the trial court has broad discretion to limit the scope of the cross-examination on various grounds, including relevancy, repetitiveness, or harassment of witness:

> Nevertheless, the Confrontation Clause does not extinguish the wide latitude that a trial judge retains to impose reasonable limits on cross-examination based on concerns about, among other things, *harassment*, prejudice, *confusion of the issues*, the witness' safety, or interrogation that is *repetitive or only marginally relevant.*

Brown v. State, 74 Md. App. 414, 419 (1988) (*citing Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)) (emphasis added). Maryland Rule 5-611 also describes the court's power to control cross-examination in broad discretionary terms:

> (a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b)(1) Except as provided in subsection (b)(2), cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Except for the cross-examination of an accused who testifies on a preliminary matter, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Mr. Turley was not denied the opportunity to cross-examine E, nor was he denied the opportunity to present a defense. Instead, the trial court limited the scope of his questions about specific hospital records that hadn't been requested and weren't in evidence. He was allowed to ask about the extent of E's relationship with Mr. Turley in the years between the incident and when she reported it to law enforcement—they remained in contact, and she even admitted to having one-on-one interactions with Mr. Turley. He

also was allowed to question her about her mental health and the care she sought. The trial court stepped in only to limit questions focused on E's failure to volunteer her personal medical record to detectives when she reported the incident. Mr. Turley argues that by not allowing him to continue down this line of questioning, the trial court prevented him from attacking the credibility of E's testimony.

We disagree. The court readily could have discerned little if any relevance between the possibility that unnamed healthcare professionals potentially violated mandatory reporting laws and E's credibility in describing her childhood sexual abuse at the hands of a relative. Likewise, we fail to see the significance to any connection between E's credibility and police investigators' decision not to request full access to her private medical information. E was not responsible for making sure mandatory reporters comply with their duty to report child abuse, nor to offer her private medical information to law enforcement when first reporting a crime committed against her. The questioning Mr. Turley sought had the potential to harass the witness and confuse the jury, and the court was well within its discretion to stop the questions before they reached that point. *See id.*; *see also Peterson v. State*, 444 Md. 105, 124 (2015) (no abuse of discretion because trial courts have wide discretion to limit cross-examinations under "Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like"); *Smallwood v. State*, 320 Md. 300, 308 (1990) (emphasizing the importance of not allowing questioning "to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion"); *State v. Cox*, 298 Md. 173, 178 (1983) ("[C]ross-

examination will not be permitted on matters that are immaterial or irrelevant to the issue being tried."); *Grandison v. State*, 341 Md. 175, 206 (1995) ("Discovery of irrelevant information is not a proper object of cross-examination.").

B. The Trial Court Did Not Abuse Its Discretion In Declining To Limit The State's Rebuttal.

Second, Mr. Turley argues that the trial court erred when it declined to limit the State's rebuttal argument regarding the absent medical records. He contends that by allowing the State to argue that Mr. Turley had the ability to subpoena the records himself to rebut the State's evidence, the court allowed the State to shift the burden of proof to him. We disagree for two reasons: *first*, the State's mention of the medical records responded directly to Mr. Turley's own closing argument and was permissible under the "open door doctrine" and, *second*, the State's rebuttal, viewed in context, didn't shift the burden of proof to the defense.

During closing arguments, counsel may not "comment upon facts not in evidence or . . . state what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005). But where one side raises an issue—"opens the door," as it were—the other is allowed to respond, and the State responding to Mr. Turley's closing here didn't shift the burden of proof. *Mitchell v. State*, 408 Md. 368, 388 (2009). In *Mitchell v. State*, defense counsel questioned in his closing statement why the State did not bring in certain witnesses who could have bolstered the defense's argument that Mr. Mitchell was misidentified. *Id.* at 377. The State responded in rebuttal by arguing that Mr. Mitchell could have brought in these same witnesses if they were vital to his defense. *Id.* at 379. Mr. Mitchell was

convicted by the jury and appealed. *Id.* at 379. This Court and the Supreme Court of Maryland both affirmed his conviction, holding that the trial court did not err in allowing the State to respond under the "open door doctrine" to Mr. Mitchell's question about the missing witnesses. *Id.* at 393.

So too here. The State's rebuttal argument responded directly to Mr. Turley's closing argument speculation about why certain records had not been entered into evidence and why certain witnesses had not been called to corroborate E's testimony. As in *Mitchell*, "'it is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government'" when responding directly to a defense argument that the State failed to present certain witnesses. *Id.* at 390 (*quoting United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir. 1998)). The State's argument was truthful—the records were available equally to both parties—and the State was allowed to counter Mr. Turley's contention that the State's decision not to obtain or produce them represented a failure of proof. The State's response was responsive and proportionate and the court didn't err in permitting the State to respond in that fashion.

Even if the "door was locked," as Mr. Turley contends, both the defense and the State in this case reminded the jury that the State bore the burden of proof:

> [STATE]: Now, the State has the absolute burden in this case to prove beyond a reasonable doubt . . . .
>
> * * *
>
> [COUNSEL FOR MR. TURLEY]: Remember, the State has the burden of proof. They have to present the evidence.
>
> * * *

> [STATE]: The defendant is not required to prove their innocence.

The trial court also instructed the jury multiple times that the closing arguments are not evidence and that the State bore the burden of proof. These instructions disabused the jury of any suggestion that Mr. Turley had to defend himself with these (or any) documents. Door-opening aside, then, Mr. Turley wasn't prejudiced by the State's remarks in its rebuttal closing. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused).

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. APPELLANT TO PAY COSTS.