Circuit Court for Montgomery County
Case No. 135166C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0566

September Term, 2020

CALVIN OKEYO-ODERA

v.

STATE OF MARYLAND

Nazarian,
Reed,
Shaw,

JJ.

Opinion by Reed, J.

Filed: April 15, 2022

Calvin Okeyo-Odera ("Appellant") was charged in the Circuit Court for Montgomery County with sexual abuse of a minor, sexual offense in the third-degree, and five counts of second-degree rape. Appellant's trial commenced on October 28, 2019. On October 30, 2019, the jury convicted Appellant on all counts. On August 7, 2020, the Circuit Court sentenced Appellant to seventy years of incarceration.

In bringing his appeal, Appellant presents three (3) questions for appellate review:

I. Did the Circuit Court err in imposing sentences on Counts 1, 4, 5, 6, and 7?

II. Was the evidence sufficient to sustain Appellant's conviction on Count 5?

III. Did the Circuit Court err in allowing the prosecutor to engage in improper closing argument?

For the following reasons, we affirm the decision of the Circuit Court.

FACTUAL & PROCEDURAL BACKGROUND

Appellant was convicted in the Circuit Court for Montgomery County of sexual abuse of a minor, sexual offense in the third-degree, and five counts of second-degree rape. The minor victim in this case was Appellant's daughter ("S.").

At the time of trial, S. was in seventh grade. In 2018, S. lived with Appellant, her younger brother ("M."), and Appellant's girlfriend – Jean. S. moved in to live with her father in 2013 after her mother suffered a stroke.

S. identified State's Exhibit 16 as the bottle that was used in the crime alleged in the indictment. S. testified that "[Appellant] put his hand in the bottle and stuck it inside my vagina." S. testified that she felt gel inside her vagina. S. testified that Appellant inserted

his finger into her vagina on five different occasions when she was ten. Further, S. testified that the last instance of digital/hand penetration occurred when she was eleven. S. testified that each of these instances took place in Appellant's bedroom.

S. also testified about an instance when Appellant "put his penis into [her] vagina." She testified that Appellant "locked the door, he told me to take my pants off, and then he sexually abused me." S. testified that Appellant put gel into her vagina, then put his fingers into her vagina, then put his penis into her vagina. S. stated that Appellant had S. touch his penis and testicles afterwards. She recalled that the incident stopped because she asked to use the bathroom. A few days after the incident, S. told her "Aunt Anne," who told her that she "shouldn't be scared[.]" S. told her brother M. about the incident a "couple of weeks" later. After telling M., S. decided to run away. That day Appellant took M. to a doctor's appointment. S. came home from school, packed some items, and went to the library at her school. At school, she told her friends about what happened, and her friends contacted the police.

On December 11, 2018, police responded to the report of sexual assault. S. told police that on the "Friday before Thanksgiving," November 16, 2018, "she had been raped by her father at their residence . . . ." After transporting S. to the Special Victims Investigative Division ("SVID"), police responded to a call from Appellant, who had reported S. as missing.

At trial, Detective James Kafchinski testified regarding his investigation of Appellant's residence on the night of December 11, 2018. At around 9:00 p.m., Detective Kafchinski began surveillance at Appellant's home. Detective Kafchinski testified as

follows:

> A little after 10:00 p.m., I observed the defendant exit the residence with luggage, what appeared to be luggage, put luggage into a vehicle. He returned to his residence and then came back out again with more luggage and his son. He put the luggage into his car, and his son get[sic] into the car, and then he drove off.

Detective Kafchinski followed Appellant. Detective Kafchinski testified that when he "was relatively close behind [Appellant], [Appellant] . . . made an abrupt U-turn and started driving in the opposite direction." However, Appellant did not appear to be driving to any particular location, and "finished the same place that he started." Appellant was arrested and police executed a search warrant for Appellant's home.

On cross-examination, Appellant testified that the last time he drank beer was in 2013. Appellant was then shown a portion of his 2018 interview with police, in which he stated that he does drink beer.

The indictment against Appellant included the following counts: *Count 4*, "to wit: did insert bottle into S.[]'s vagina, the first time"; *Count 5*, "to wit: did insert bottle into S.[]'s vagina, the last time"; *Count 6*, "to wit: did digitally penetrate S.[]'s vagina, the first time"; *Count 7*, "to wit: did digitally penetrate S.[]'s vagina, the last time."

Appellant was convicted and sentenced on all counts. Appellant timely filed his appeal.

DISCUSSION

I. Did the Circuit Court err in imposing sentences on Counts 1, 4, 5, 6, and 7?

A. Legal Background

On February 7, 2019, the State indicted Appellant on five counts of second-degree rape, one count of sexual abuse of a minor, and one count of sexual offense in the third-degree. Count 1 charged Appellant with sexual abuse of a minor. Among the five counts of second-degree rape, four of the counts (Counts 4-7) were predicated on a "sexual act," as opposed to "vaginal intercourse." Counts 4-7 each cited Section 3-304 of the Criminal Law Article ("Crim. Law"). Those Counts read, in relevant part, as follows:

Count 4, "to wit: did insert bottle into S.[]'s vagina, the first time";

Count 5, "to wit: did insert bottle into S.[]'s vagina, the last time";

Count 6, "to wit: did digitally penetrate S.[]'s vagina, the first time";

Count 7, "to wit: did digitally penetrate S.[]'s vagina, the last time."

In his first issue raised on appeal, Appellant contends that the Circuit Court erred in imposing sentences on these counts. Appellant's argument is largely predicated on the 2017 amendment of Crim. Law § 3-304, which reclassified second-degree rape to include rape by sexual act. Prior to October 1, 2017, Crim. Law § 3-304 read, in part, as follows:

§ 3-304. Rape in the second degree

(a) A person may not engage in vaginal intercourse with another:

(1) by force, or the threat of force, without the consent of the other;

(2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or

(3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

(Effective: October 1, 2016 to September 30, 2017). Notably, prior to October 1, 2017, Crim. Law § 3-304 did not classify engaging in a sexual act with a minor as second-degree rape. Instead, prior to October 1, 2017, Crim. Law § 3-305 classified engaging in a sexual act with a minor as a first-degree sexual offense.

In legislation effective on October 1, 2017, Crim. Law § 3-304 was amended to reclassify the illegal sexual acts – which were previously classified as first-degree sexual offense under Crim. Law § 3-305 – as rape in the second-degree:

§ 3-304. Rape in the second degree

(a) A person may not engage in vaginal intercourse ***or a sexual act*** with another:

(1) by force, or the threat of force, without the consent of the other;

(2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or

(3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

(Emphasis added). The relevance of this amendment to the present appeal relates to the approximate dates in which Appellant engaged in the sexual acts for which he was convicted and sentenced. Appellant's general contention, that his sentences were illegal, is dependent on slightly differing reasoning with respect to each count. However, the crux of Appellant's argument for each count is that he was sentenced to second-degree rape (by sexual act) for conduct that occurred prior to October 1, 2017. Accordingly, Appellant

argues that he was "convicted and sentenced for a non-existent crime." (Appellant br. at 21). With that legal backdrop in mind, we turn to address Appellant's claims for each related count.

B. Standard of Review

Appellate review under Rule 4-345(a) involves purely legal determinations. The Rule states that the "court may correct an illegal sentence at any time". Accordingly, we review Rule 4-345 challenges *de novo*. *Carlini v. State*, 215 Md. App. 415, 443 (2013); *Bailey v. State*, 464 Md. 685, 696 (2019). In reviewing a challenge under Rule 4-345, we narrowly focus on the sentence itself, not the "antecedent trial procedure culminating in the sentence." *Pitts v. State*, 250 Md. App. 496, 503 (2021). Our review is narrowly focused on the sentence itself because

> [t]he only thing subject to correction . . . is 'an illegal sentence.' No matter what antecedent procedural improprieties a Rule 4–345(a) hearing might show, the underlying conviction itself is not in jeopardy. There are other avenues available for challenging allegedly erroneous convictions and those remedial avenues have, of course, their attendant constraints and limitations.

Carlini, 215 Md. App. at 442. In other words, the illegality of a sentence must "inhere in the sentence itself[.]" *Matthews v. State*, 424 Md. 503, 512 (2012). The illegality of a sentence inheres in the sentence itself where "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed." *Chaney v. State*, 397 Md. 460, 466 (2007).

C. Analysis

i. Counts 4 and 6

With respect to Count 4, "insert bottle into…vagina, the first time," S. testified that

Appellant "put his hand in the bottle and stuck it inside my vagina" and that she was 10 the "first time" this happened. As for Count 6, "digitally penetrate…vagina, the first time," S. testified that Appellant digitally penetrated her vagina "five" times – the earliest instance when she was 10; the latest when she was 11. Appellant notes that, based on S.'s birth date, S. was never ten years old on or after October 1, 2017. Accordingly, Appellant contends that his sentences under Counts 4 and 6 were illegal because he was sentenced for a crime that did not exist – i.e., second degree rape by sexual act – when he committed the alleged acts. Appellant argues that the circuit court lacked jurisdiction to sentence him for a nonexistent crime and requests that his convictions under Counts 4 and 6 be vacated.

In response, the State first argues that Appellant never raised this issue at trial or during sentencing, thereby failing to preserve his sentencing claims for review. Further, the State notes that because his claims are unpreserved, Appellant "would need to show that the claim went to the trial court's jurisdiction or the legality of his sentence" to successfully assert his claim on appeal. The State contends that Appellant's claims are not jurisdictional in nature because the 2017 amendments to Crim. Law § 3-304 "did not create a new offense or institute new or different punishments." Rather, the State asserts that the amendments merely reclassified the same substantive crime – first degree sexual act – to second degree rape. Accordingly, the State argues that, regardless of the classification of the crime, Appellant's crimes were cognizable offenses which the Circuit Court had jurisdiction to consider. The State also notes that Appellant's trial counsel agreed, without objection, to the pattern jury instructions for the new version of Crim. Law § 3-304. Finally, the State contends that even if the 2017 amendments were a substantive change in the law, the

indictment was not jurisdictionally defective because Appellant was charged with rape by sexual act during a period which "spans the effective date of the legislation." Instead, the State argues that the alleged error would create a problem of proof at trial or jury instructional error, neither of which Appellant has preserved for review.

Appellant was convicted under both Counts 4 and 6 of second-degree rape and received a 20-year sentence for each conviction. These sentences were within the statutory limits of the statutes Appellant was convicted under, Crim. Law § 3-304, as well as the old version of Crim. Law § 3-305, which Appellant contends he should have been charged under.

As previously noted, the only thing subject to correction under Rule 4-345 is the sentence itself; the underlying conviction is not in jeopardy. *Carlini*, 215 Md. App. at 442. In other words, a Rule 4-345 challenge is not the proper venue for attacking the underlying facts which sustained a conviction – it is not a challenge to sufficiency of evidence. Here, Appellant was convicted under Crim. Law § 3-304 and sentenced within statutory limits. Appellant's contention is that the evidence adduced at trial indicates that the conduct, which sustained his convictions under Counts 4 and 6, occurred prior to the effective date of the statute of his conviction. Whether S. was ten or eleven during the alleged incidents, or when exactly the alleged incidents occurred, is a question of fact for the jury to decide. Whether the jury relied on S.'s testimony about her age during the alleged conduct was also a question for the jury to decide.

The arguments which Appellant now proffers should have been raised as a challenge to the charging document under Md. Rule 4-252. Under Rule 4-252(a)(1), a defendant may

file a motion asserting "[a] defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense[.]" A motion which alleges a defect in the charging document must be raised before trial unless the motion asserts "failure of the charging document to show jurisdiction in the court or to charge an offense[.]" Md. Rule 4-252(d). Such challenges may be raised at any time because "where no cognizable crime is charged, the court lacks fundamental subject matter jurisdiction to render a judgment of conviction, i.e., it is powerless in such circumstances to inquire into the facts, to apply the law, and to declare the punishment for an offense." *Williams v. State*, 302 Md. 787, 792 (1985). Failure to timely assert a defect in a charging document under Rule 4-252 results in waiver of any subsequent challenge to the charging document, where the charging document alleges a cognizable crime and the court has fundamental subject matter jurisdiction to render a judgment of conviction. The charging document in this case did not fail to show jurisdiction in the court or to charge an offense. Appellant was charged with a cognizable crime and the Circuit Court had fundamental subject matter jurisdiction to render a judgment of conviction for second degree rape. Accordingly, Appellant was required to raise any Rule 4-252 challenge, alleging a deficient charging document, prior to trial. At the very latest Appellant was required to raise any Rule 4-252 challenge as soon as the defect in the charging document became apparent at trial. Appellant failed to do so. By failing to allege a defect in the charging document, Appellant waived his right of appeal on the issue.

Regardless, a challenge to the charging document under Rule 4-252 would have been fruitless for Appellant because

> [o]n 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. . . .

Md. Rule 4-204. In the case *sub judice*, the State could have amended the charges on Counts 4 and 6, by changing the statute citations, without Appellant's consent. Changing the statute citation would not require Appellant's consent because the amendment would not change the character of the offense charged. The offense charged would be for precisely the same conduct and tried under a substantively identical statute. This likely explains why Appellant's trial counsel did not bother to lodge a Rule 4-252 challenge, and why Appellant's trial counsel agreed to the jury instructions based on the new version of Rule 4-345. If we were to allow Appellant to invoke Rule 4-345(a) based on an allegedly deficient charging document, which should have been challenged under Rule 4-252, we would encourage defendants to do nothing when they notice a non-substantive deficiency in a charging document. A defendant could bide his time until his conviction and sentencing, after which the charging document cannot be amended. He or she could subsequently raise a Rule 4-345 challenge which would effectively act as an untimely non-substantive Rule 4-252 challenge. We decline to allow such an end-run around the timeliness requirements of Rule 4-252.

ii. Counts 5 and 7

Appellant contends that his sentences under Counts 5 and 7 should also be deemed illegal. As to Count 5, "insert bottle into…vagina, the last time," Appellant asserts that S. did not testify to more than one instance of such conduct. Regarding Count 7, "digitally

penetrate…vagina, the last time," Appellant argues that the jury could only speculate as to whether the last instance occurred after October 1, 2017. Appellant's argument relies on S.'s testimony that she was eleven when the last instance occurred. Because S. was eleven for a brief period prior to October 1, 2017, Appellant contends that the jury was left to speculate as to whether the last instance occurred on or after October 1, 2017. Thus, Appellant argues that "the sentences imposed on Counts 5 and 7 are illegal because there is no rational basis for concluding that they were not imposed for convictions for non-existent crimes, i.e., second-degree rape by [sexual act] occurring prior to October 1, 2017."

In response, the State reiterates that Appellant did not preserve his challenge to his convictions and sentences on Counts 5 and 7. Moreover, the State notes that even if the Appellant's claims were properly preserved, the jury had sufficient evidence to convict Appellant under Counts 5 and 7 based on testimony and DNA evidence regarding Appellant's alleged sexual acts during the November 2018 incident.

Appellant's contentions with respect to Counts 5 and 7 rely on the same insufficiency arguments as Appellant's contentions with respect to Counts 4 and 6. Appellant argues that his convictions under Counts 5 and 7 are illegal because the evidence adduced at trial is susceptible to the interpretation that Appellant's acts occurred before such acts would be considered rape by sexual act. Thus, Appellant argues that any ambiguity should be resolved in his favor. We disagree.

As previously explained, we treat Appellant's claims regarding Counts 5 and 7 as challenges to the sufficiency of evidence to sustain his convictions on those counts. The

illegality of Appellant's sentences under Counts 5 and 7 does not inhere in the sentence itself because Appellant was convicted under a valid statute and sentenced within the statutory limits. Moreover, Appellant failed to preserve his challenge to the sufficiency of the evidence for Appellate review.

Nonetheless, Appellant urges that we notice plain error review on his claims under Counts 5 and 7, arguing that the failure of Appellant's trial counsel to raise possibility that he was convicted of a "non-existent crime" amounted to ineffective assistance of counsel. We disagree. Appellant's counsel ultimately agreed to the jury instructions on the new version of the statute which outlawed identical behavior and carried the same sentence. Thus, while Appellant's trial counsel could have objected to the use of the new statute at that time, we see no basis for the contention that the outcome would have been any different under the new statute. We decline to notice plain error review of Appellant's claims under Counts 5 and 7. We hold that the Circuit Court did not err in sentencing Appellant under Counts 5 and 7.

iii. Count 1

Appellant contends that the basis for his conviction on Count 1 – sexual abuse of minor – is vague and ambiguous because the jury verdict did not specify the modality of sexual abuse. Further, Appellant asserts that "[t]here is no rational basis for concluding that Appellant's conviction on Count 1 is not based upon the conclusion of one or more jurors that Appellant committed 'rape' by unlawful penetration at a time when such a 'rape' did not exist." Appellant urges that such ambiguity should be resolved in his favor and his sentence under Count 1 should be deemed illegal.

We initially dispose of Appellant's second contention – that "[t]here is no rational basis for concluding that Appellant's conviction on Count 1 is not based . . . 'rape' by unlawful penetration at a time when such a 'rape' did not exist." For the reasons expressed in our discussions of Counts 4-7, we hold that Appellant failed to preserve his sufficiency of the evidence claims for appellate review, and that his challenge to the legality of those sentences is non-justiciable.

Appellant additionally argues that the basis for his conviction under Count 1 – sexual abuse of minor – is vague and ambiguous because the jury verdict did not specify the modality of sexual abuse. Accordingly, Appellant contends that the ambiguity should be resolved in his favor and his sentence under Count 1 should be deemed illegal. The circuit court instructed that the element of "sexual abuse" for purposes of Count 1 included "rape or third[-]degree sexual offense or sexual exploitation." In the present case, Appellant was convicted under multiple counts for acts which would support his conviction under Count 1. The fact that the specific act was not expressly stated by the jury is not grounds for reversal where the basis of the conviction is apparent from evidence of ongoing sexual abuse adduced at trial. *See, e.g.*, *Harmony v. State*, 88 Md. App. 306 (1991) (sustaining a child abuse conviction where the child alleged that a relative committed multiple acts of sexual abuse from 1980 to 1988).

Moreover, the court, during sentencing on Count 1 stated as follows:

> Now we've all agreed that Count 2 which is second degree rape, the vaginal intercourse will merge into Count 1. So, I'll merge Count 2 into Count 1. So, for sexual abuse of a minor I'll sentence you to 25 years to the Department of Corrections.

Clearly, the court treated Count 2 – second degree rape via vaginal intercourse – as the predicate act to support Appellant's conviction under Count 1. Accordingly, we hold that that the circuit court did not err in sentencing Appellant under his Count 1 conviction.

II. Sufficiency of the Evidence to Sustain Count 5

A. Parties' Contentions

Appellant contends that the evidence adduced at trial was insufficient to sustain Appellant's conviction under Count 5, "insert bottle into…vagina, the last time." Appellant argues that the evidence was insufficient because S. did not testify to more than one instance of such conduct. Appellant acknowledges, however, that his trial counsel did not move for judgment of acquittal on this basis. Therefore, Appellant asks this Court to exercise plain error review to address his sufficiency claim. Further, Appellant asserts that his trial counsel's failure to request acquittal on this issue constituted ineffective assistance of counsel.

In response, the State initially contends that this Court should decline to address Appellant's claim because he failed to preserve the issue for review. Further, the State argues that even if we were to address Appellant's claim, Appellant's claim would fail because there was sufficient evidence to convict Appellant under Count 5.

B. Standard of Review

To determine whether evidence is sufficient to sustain a conviction, we ask "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." *Taylor v. State*, 346 Md. 452, 457 (1997) (*quoting Jackson v. Virginia*,

443 U.S. 307, 319 (1979)).

C. Analysis

Appellant acknowledges that his trial counsel did not move for acquittal on the grounds that the evidence was insufficient to sustain his conviction under Count 5. However, Appellant urges this court to exercise plain error review of his insufficiency claim because he argues that "the insufficiency of the evidence [to sustain his Count 5 conviction] is plain." Additionally, Appellant argues that the failure of his trial counsel to challenge the sufficiency of the evidence to sustain his Count 5 conviction constituted ineffective assistance of counsel.

> Plain error review is reserved for
>
> > errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.' *Savoy*, 420 Md. at 243 (2011) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). Among the factors the Court considers are "the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id*. This exercise of discretion to engage in plain error review is "rare." *Id*. at 255, 22.
> >
> > 'There is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused.' *Garrett v. State*, 394 Md. 217, 224 (2006) (alteration in original) (quoting *Jones v. State*, 379 Md. 704, 713 (2004)).

Yates v. State, 429 Md. 112 (2012). We have previously noted "there is no instance of a Maryland appellate court's ever applying the 'plain error' exception so as to entertain a non-preserved challenge to the legal sufficiency of the State's evidence." *Williams v. State*, 131 Md. App. 1, 7 (2000). In the *Williams* case, the appellant sought plain error review of a legal sufficiency claim notwithstanding that the appellant had not moved for judgment of

acquittal. We noted that, absent a prerequisite motion for acquittal, we have no discretion to review a legal sufficiency challenge. *Id*. It is the motion for acquittal that provides the basis for an appellate court's review for sufficiency of the evidence. In the present case, Appellant *did* move for acquittal, but did not do so on the grounds that the evidence was insufficient to sustain his conviction under Count 5. Accordingly, Appellant failed to preserve his challenge to the sufficiency of the evidence to sustain his Count 5 conviction. We now turn to Appellant's argument that his trial counsel's failure to move for acquittal under Count 5 constituted ineffective assistance of counsel.

"[T]o establish ineffective assistance of counsel, [Appellant] must show that: (1) his attorney's performance was deficient; and (2) he was prejudiced as a result." *Newton v. State*, 455 Md. 341, 355 (2017) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). Under the first prong, Appellant must demonstrate that his "counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy." *Id*. To establish prejudice under the second prong, Appellant "must show either: (1) 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'; or (2) that 'the result of the proceeding was fundamentally unfair or unreliable.'" *Id*. (quoting *Coleman v. State*, 434 Md. 320, 331 (2013)).

Appellant's ineffective assistance claim raises a mixed question because it necessarily requires an analysis of his trial counsel's strategy and likely success of a motion for acquittal under Count 5. The factual record for our review does not provide enough information to elucidate the potential strategy implemented by Appellant's counsel in

declining to move for acquittal on Count 5. However, even if Appellant's counsel had moved for acquittal on Count 5, the record contains facts which could sustain Appellant's conviction under Count 5. Although S. did not specifically testify about a second instance of insertion of "the bottle," S. had interchangeably referred to "the bottle" as "the gel" throughout the trial.[1] When discussing an incident that occurred in November 2018, S. testified as follows:

> [PROSECUTOR]: What did he do?
>
> [S.]: He put his penis into my vagina.
>
> [PROSECUTOR]: Okay, but before he did that, did he use the gel?
>
> [S.]: Yes.
>
> [PROSECUTOR]: Did he use his fingers? What did he do?
>
> [S.]: **He used the gel and his fingers.**
>
> [PROSECUTOR]: Okay. You say he used the gel, did he put the gel into your vagina?
>
> [S.]: Yes.
>
> [PROSECUTOR]: Okay, and then his fingers?
>
> [S.]: Yes.
>
> [PROSECUTOR]: Okay. Now, prior to that time, had he put his penis in your vagina? Prior to that time in November? Had that ever happened before?
>
> [S.]: No.

[1] At trial, S. identified the blue bottle referenced in Counts 4 and 5: "He used it when he sexually abused me." S. referred to the bottle itself as "the gel." When shown the bottle, S. testified that that was "the gel he used when he sexually abused me." When asked what Appellant did with the bottle, S. testified that, "He put his hand in the bottle and stuck it inside my vagina."

(emphasis added). From this exchange, coupled with the fact that S. used "the gel" and "the bottle" interchangeably, the jury could have found that the evidence was sufficient to convict Appellant under Count 5. Accordingly, even if Appellant's trial counsel was deficient in failing to move for acquittal under Count 5, we hold that any deficiency was not prejudicial to Appellant.

III. Prosecutor's Statements During Closing Argument

A. Parties' Contentions

Appellant's final contention on appeal relates to statements by the prosecutor during closing argument. Specifically, Appellant argues that the prosecutor misstated the law by misconstruing the reasonable doubt standard during closing remarks. Appellant highlights the following remarks from the prosecution during closing argument:

> [PROSECUTOR]: When you talk about reasonable doubt it is all about making a decision in your own personal or business affairs. We do that all the time. All the time. We take all of the information, all of it. We look at everything and we say you know, when you are looking at buying a house, you know, I don't feel great. I have, I'm not sure about you know this rate but all of these other pieces, you know, maybe this other one would charge me more in the long run.
>
> Maybe this isn't the company I like or things like that. You are looking at all of those pieces. You might look at something and say, you know, on its face one little piece all right, I don't really like that. That gives me some doubt. But when I put everything together, when I put all those pieces together, when I put the company and I put the amount together. When I put the, you know the rate and all those things, how is my experience going to be? Then I say I can make this decision beyond a reasonable doubt because I looked at everything and put it together.
>
> The same thing if you try to determine where to send your kid to preschool. You know you go to preschools and you might, you know when you drop

> your kid off the first day, you're like, did I make the right decision? But you looked at everything.
>
> You looked at the other places and cost and teachers and all those things and you put all those things together, you make the decision –
>
> [APPELLANT COUNSEL]: Objection.
>
> [PROSECUTOR]: -- beyond a reasonable doubt.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Beyond a reasonable doubt that this is the best decision. That's what we're talking about when beyond a reasonable doubt in your own personal or business affairs.

Appellant argues that the prosecutor's comments were tantamount to telling the jury that they could decide Appellant was guilty with reservation. Moreover, Appellant contends that the circuit court did not take any measures to cure any potential prejudice from the prosecutor's comments. Thus, by denying Appellant's objection to the prosecutor's comments, Appellant contends that the circuit court committed reversible error.

In response, the State contends that Appellant only reserved his objection to the prosecutor's comments that immediately preceded the objection, i.e., "[y]ou looked at the other places and cost and teachers and all those things and you put all those things together, you make the decision[.]" Further, the State contends that the prosecutor's remarks were well within the wide latitude given to counsel during closing argument. The State asserts that "[i]t was not improper for counsel, in argument, to give the jury other examples of important life or business decisions as long as counsel's argument did not encourage the jury to apply a standard of proof different from the approved instruction on reasonable doubt."

B. Standard of Review

Generally, "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). "'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Id*. at 429-30 (quoting *Jones v. State*, 310 Md. 569, 580 (1987)). During closing arguments an attorney is permitted to "indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Id*. at 430. Moreover, "a trial court has broad discretion when determining the scope of closing argument." *Cagle v. State*, 462 Md. 67, 75 (2018) (Citing *Ware v. State*, 360 Md. 650, 682 (2000)). However, the scope of permissible closing argument is not unlimited. *See e.g. Sivells v. State*, 196 Md. App. 254, 278 (2010) (Counsel may not impermissibly vouch for the credibility of witnesses or express his or her personal opinion concerning the guilt of the accused during closing argument.); *White v. State*, 66 Md. App. 100, 118 (1986) ("[W]here there is no dispute as to the law, counsel will not be permitted to argue law even where the argument is 'consistent' with the court's instructions."); *Smith v. State*, 388 Md. 468, 488 (2005) ("[C]ourt should not permit counsel to state and comment upon facts not in evidence or to state what he or she would have proven."). *Mitchell v. State*, 408 Md. 368 (1949) (During closing argument, it is improper for counsel to "appeal to the prejudices or passions of the jurors . . . or invite the jurors to abandon the objectivity that their oaths require.") (internal citations omitted).

As we explained in *Carroll v. State*, 240 Md. App. 629, 663 (2019):

> What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case. Thus, the propriety of prosecutorial argument must be decided contextually, on a case-by-case basis. Because a trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case, the exercise of its broad discretion to regulate closing argument will not be overturned unless there is a clear abuse of discretion that likely injured a party.

Accordingly, we assess the circuit court's decision to permit the prosecutor's statements under an abuse of discretion standard. We will not disturb the circuit court's decision absent a clear abuse of discretion that likely injured a party. "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005).

C. Analysis

Appellant argues that the prosecutor misstated the reasonable doubt standard during closing remarks, and that the misstatement was prejudicial. We initially note that Appellant's objection was made in response to the prosecutor's pre-school example – in which the prosecutor used the decision of where to send your child to pre-school as an example for "reasonable doubt in your own personal or business affairs." Therefore, in our review of this issue, we consider only the portion of the prosecutor's statements objected to by Appellant. *See Shelton v. State*, 207 Md. App. 363, 385 (2012) (defendant's challenge to remarks from prosecutor during closing argument was not preserved for appeal because the defense did not object in response to the specific remarks at issue); *see also Purohit v. State*, 99 Md. App. 566, 586 (1994) (same). That portion is as follows:

> [PROSECUTOR]: The same thing if you try to determine where to send your kid to preschool. You know you go to preschools and you might, you know when you drop your kid off the first day, you're like, did I make the right decision? But you looked at everything.
>
> You looked at the other places and cost and teachers and all those things and you put all those things together, you make the decision –
>
> [APPELLANT COUNSEL]: Objection.
>
> [PROSECUTOR]: -- beyond a reasonable doubt.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Beyond a reasonable doubt that this is the best decision. That's what we're talking about when beyond a reasonable doubt in your own personal or business affairs.

Maryland's pattern jury instruction for the reasonable doubt standard, MPJI-CR 2:02, states that "[p]roof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs."

In *Ruffin v. State*, 394 Md. 355, 372-73 (2006), the Court of Appeals held that

> in every criminal jury trial, the trial court is required to instruct the jury on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02. Deviations in substance will not be tolerated.

Appellant contends that the prosecutor's remarks constituted a substantive deviation from the reasonable doubt standard expressed under MPJI-CR 2:02. Specifically, Appellant contends that the prosecutor's comments misconstrued the reasonable doubt standard by leaving jurors with the impression that they could find Appellant guilty with reservation.

Ruffin requires "the *trial court* . . . to *instruct the jury* on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02." 394 Md. at 372-73 (emphasis added). *Ruffin* did not expressly limit the permissible scope of closing argument. Nonetheless, we have subsequently held that when commenting on the burden of proof "counsel's closing argument must not undermine the judicially approved pattern definition of reasonable doubt." *Anderson v. State*, 227 Md. App. 584, 590 (2016). Appellant argues that the Circuit Court sanctioned the prosecutor's deviation from the pattern reasonable doubt standard by allowing the prosecutor to deviate from MPJI-CR 2:02.

Thus, we must determine whether the prosecutor's remarks were a substantial deviation from the instructions given under MPJI-CR 2:02, and if so, whether that deviation was prejudicial to Appellant. Appellant argues that the "pre-school example" was inappropriate because, "while parents might have a choice between pre-schools, it might be a choice between pre-schools with distinctive drawbacks. In other words, as to each school there might be a reason to doubt that it is the right school for their child." The prosecutor used pre-school example to show how a person may decide beyond a reasonable doubt in their personal or business affairs. Strictly speaking, the use of an appropriate example of personal or business decisions would not undermine the approved definition under MPJI-CR 2:02. In this case, however, the prosecutor's characterization of the pre-school decision deviated from the proper standard. The comparison was inappropriate because the choice between two or more competing pre-schools has little in common with the yes or no decision of conviction. Had the prosecutor compared the decision to send a

child to pre-school or not, the analogy may have been more apt. But as Appellant notes, the analogy the prosecutor used could imply that jurors may choose to convict if it is the best choice among competing decisions. By allowing the prosecutor to deviate from the proper standard in closing argument, the Circuit Court abused its discretion. However, we hold that any error was harmless beyond a reasonable doubt, and thus, reversal is not required. We explain.

A reviewing court may consider several factors in deciding whether an improper statement during closing argument constitutes reversible error. Those factors include "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005). Here, although the remarks deviated from the approved reasonable doubt standard, the deviation was not severe. While the prosecutor's remarks are susceptible to the implication that jurors may choose to convict if it is the best choice among competing decisions; the remarks could also be understood as an important personal decision that, even when made without any reasonable reservation, could still leave a parent wondering if they made the right decision. The remarks were also brief, only a few lines within a sizable closing argument.

While there is no indication of subsequent attempts to cure any potential prejudice, the Circuit Court had previously instructed the jury on the proper standard of proof and informed the jury that closing arguments were not evidence. Such instructions by the Circuit Court are not sufficient to cure any subsequent prejudice. However, in this case, where the remarks were not severe, the Circuit Court's proper instructions are ameliorative.

Finally, the weight of the evidence against Appellant was such that any error was unlikely to impact the outcome of the case. Among the evidence was: (1) S.'s testimony of Appellant's pattern of rape and abuse; (2) DNA evidence from the lubricant bottle which implicated Appellant and corroborated S.'s testimony; (3) expert testimony that S.'s hymen was partially transected, an indication of sexual abuse; (4) testimony from S.'s social worker that S.'s statement "had a lot of details [which], unless experienced on her own, would be very difficult to relate back in a sequential order;" (5) consciousness of guilt evidence based on Appellant's lack of cooperation with the social worker and police, as well as his ostensible flight from his home with packed bags and passports. Given the weight of the evidence against Appellant, it is unlikely that regulating the prosecutor's brief remarks would have altered the outcome of the case.

In sum, the prosecutor's remarks were not severe, and given the weight of the evidence presented against Appellant, were unlikely to prejudice Appellant. Accordingly, we hold that any error in failing to regulate the prosecutor's remarks was harmless.

CONCLUSION

We hold that the Circuit Court did not err in in imposing sentences against Appellant on Counts 1, 4, 5, 6, and 7. Appellant's contention that he was convicted under the wrong statute is tantamount to a challenge to the sufficiency of evidence which is not cognizable under Rule 4-345. Further, we hold that even if Appellant had properly preserved his challenge to the sufficiency of evidence to sustain Count 5, the evidence adduced at trial was sufficient to convict Appellant under Count 5. Finally, we hold that any error in failing to regulate the prosecutor's closing remarks was harmless because the prosecutor's remarks

were not severe and was unlikely to prejudice Appellant given the weight of the evidence presented. Accordingly, we affirm the decision of the Circuit Court.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.