

Circuit Court for Wicomico County
Case No. C-22-CR-19-000481

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 601

September Term, 2020

ALLAN SCARBOROUGH

v.

STATE OF MARYLAND

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 30, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Allan Scarborough was convicted by a jury in the Circuit Court for Wicomico County of two counts of sexual abuse of a minor, three counts of second-degree sexual offense and two counts of third-degree sexual offense with respect to his stepdaughter, S.T., and an additional two counts of sexual abuse of a minor, two counts of second-degree sexual offense, and seven counts of third-degree sexual offense relating to his other stepdaughter, K.T. Appellant presents the following questions for our review:

- “1. Did the trial court err when it overruled defense counsel’s objection and permitted the State to make a burden-shifting argument in rebuttal closing argument?
2. Did the trial court err when it denied defense counsel’s motion to exclude school photographs of the complaining witnesses?
3. Did the trial court abuse its discretion when it refused to issue a subpoena, in connection with Mr. Scarborough’s claim, made in his motion for new trial, that a juror slept during most of the first day of trial, and thus denied the motion without hearing from the juror in question?
4. Was the evidence insufficient to support Mr. Scarborough’s convictions?”

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Wicomico County on charges of sexually abusing two minors: S.T. and K.T. In all, the appellant was indicted for thirty-three charges. The jury convicted him of four counts of sexual abuse of a minor, five counts of second-degree sexual offense, and nine counts of third-degree sexual offense. For the charges relating to S.T., the jury and the court acquitted appellant of first-degree sexual offense and two counts of second-degree sexual offense. For the charges relating

to K.T., a jury acquitted appellant of first-degree sexual offense, eight counts of second-degree sexual offense, and three counts of third-degree sexual offense. The court sentenced appellant to a term of incarceration of twenty-five years for sexual abuse of a minor (S.T.), twenty years for second-degree sexual offense (S.T), twenty-five years for sexual abuse of a minor (K.T.), and twenty years for second-degree sexual offense (K.T.), to be served consecutively for a total term of incarceration of ninety years.

Appellant was charged with sexually abusing his stepdaughter S.T. between July 10, 2010, and July 10, 2012. After moving in with S.T.'s mother and sister (K.T.), appellant slept upstairs in a different room while S.T., K.T., and their mother slept downstairs in separate rooms.

S.T. described the first time she remembered appellant abusing her and recalls being ten years old. After coming downstairs and telling S.T. that they were going to watch a movie, he brought her upstairs. He put on a movie; S.T. related that he then “put his hand down my pants,” and digitally penetrated her vagina.

She recalls the next abusive incident as similar: he came downstairs to get her, they went upstairs, he put on a movie, and put his finger into her vagina. S.T. testified that appellant also put her hand on his penis. He removed his pants and told her what to do. She did not tell her mother, sister, or father because appellant told her that if she told anyone, he would kill her.

S.T. testified about a separate incident where appellant's fingernails — described as long and thick — cut her vagina. After she said “ow,” appellant stopped. The cut bled and

S.T. remembers a burning sensation when urinating. Needing to go to the doctor, S.T. told her mother that she was bleeding, but did not disclose why. After the appointment, she recalls her father applying ointment to her cut.

S.T. did not remember the exact number of sexually abusive interactions, but believes it was around five. She was around ten years old at the time of the first sexual encounter and remembers appellant threatening her life twice. S.T. testified that she did in fact believe him due to the presence of guns within the home.

On June 6, 2019, S.T.'s mother and appellant got into an argument. Appellant told S.T. that her mother had cheated on him, and her mother was upset and crying. S.T. later noticed injuries on her mother. The argument drove S.T.'s mother to want to leave the relationship and seek a protective order, and while S.T. and her mother were headed to gain the protective order, S.T. told her mother that appellant had touched her inappropriately. This was the first time that S.T. disclosed appellant's actions; she explained that she felt safe because her mother was intent on leaving the relationship.

Her mother then sought a protective order for S.T. as well. The charges were not exclusive to S.T.; appellant was also charged with sexually abusing her sister, K.T., between April 14, 2008, and April 14, 2014. K.T. confirmed that appellant slept on a separate floor than the rest of the family.

K.T. did not recall the initial time appellant abused her "separate from the others." She testified that in the middle of one night, appellant took her out of her room and brought her to his upstairs bedroom. K.T. described herself and appellant on the bed when he

touched her vagina with his hands and digitally penetrated her. She recalls appellant's fingernails as very long. Appellant then made K.T. touch his penis and move her hand around. She left after he fell asleep.

K.T. testified that incidents similar to this experience happened more than once. She testified that she touched appellant's penis "about five times" and believes that he touched her vagina "like ten times." During the first few abusive incidents, appellant kept his forearm against her chest so she remained stuck in place. On some occasions, he threatened to kill her or people she loved if she disclosed anything. K.T. testified that the incidents stopped when she was ten years old and when she began sleeping with her mother.

Pre-trial, appellant moved *in limine* to prohibit the State from presenting photographs of S.T. and K.T. that were taken at the time of the alleged abuse. The court denied the motion, permitting the State to introduce one photo of each girl. After appellant renewed his objection at trial, the court permitted the State to provide a school photograph of K.T. taken in 2011 and a different school photograph of S.T. from 2011. Appellant now appeals that ruling.

After trial, appellant moved for a new trial, arguing that the verdict was against the evidence. He also challenged a jury instruction and opposed the prosecutor's closing argument as improperly shifting the burden. On July 31, 2020, the defense filed a "Supplement to Motion for New Trial" on the grounds that a single juror slept through the first day of trial. The court heard argument on the motion at the start of the sentencing hearing, declined to issue a subpoena to the juror, and denied the motion for new trial,

ruling as follows:

“As far as the sleeping juror, we were all in court. Counsel was in court. Nobody saw anything they thought necessitated that being brought to the attention of the court at the time. The court is not persuaded that there was a sleeping juror that affected the rendering of the verdict.”

The court imposed sentence and this timely appeal followed.

II.

Before this Court, appellant argues that the circuit court erred in deciding four matters: defense counsel’s objection to a burden-shifting remark made by the State in their rebuttal closing argument, appellant’s motion to exclude school photographs of the alleged victims, appellant’s motion for a new trial due to juror misconduct and the related refusal to issue a subpoena to hear from the juror in question, and insufficient evidence for appellant’s convictions.

Appellant argues first that the State shifted the burden to appellant in its rebuttal closing argument, and the circuit court erred when it overruled defense counsel’s objection. Appellant points to the context of the trial and notes the cross-examination of the alleged victims’ mother, Ms. Scarborough. When defense counsel asked if there was anything unusual about appellant’s genitals, Ms. Scarborough testified that appellant’s penis “curves to the left” and that the curve is “very” pronounced.

Appellant highlights a lack of description regarding any unusual characteristics of appellant’s penis during S.T. or K.T.’s testimony. Defense counsel raised the putative testimonial inconsistency during closing arguments. During the State’s closing rebuttal,

the prosecutor then replied as follows:

“[T]he comment about the defendant’s penis, the fact that Mrs. Scarborough decided that it — whatever it was, there was something special about his penis, that question was never asked of the girls. So it’s interesting that [defense counsel] only chose to ask Mrs. Scarborough because he wasn’t really sure what the girls would answer.”

Appellant claims the prosecutor’s remark shifted the burden of proof onto the defense and suggested to the jury that the defendant should provide evidence refuting guilt. Appellant argues that the State shifted the burden of proof by referring to the lack of questioning of the alleged victims on the shape of appellant’s genitals, and influenced the jury by suggesting that defense counsel should engage in that line of questioning.

Next, appellant argues that the circuit court erred by allowing the State to introduce school photographs of the alleged victims. Before trial, appellant filed a motion to exclude photographs of S.T. and K.T. taken around the time of the alleged abuse, but the court ruled that the State could introduce one school photograph of each girl from 2011.

Appellant argues that the school photographs were more prejudicial than probative, as the period between the alleged charges and trial was not significant and the victims had not greatly matured. Appellant does not expressly state the exact nature of the resulting prejudice, instead urging lack of relevancy, but implies that prejudice existed because the school photos were a play for sympathy or because the very nature of a school photograph could suggest innocence, vulnerability, or guilelessness. Appellant states that the photographs were prejudicial to the extent that they might have bolstered the girls’ testimony, which appellant urges was vague and inconsistent with other evidence;

appellant also emphasizes that the girls had a motive to make up false allegations to please their mother, whom appellant suggests was bitter about the bad end of her relationship with appellant. Elaborating upon the purported prejudice, appellant adds that S.T. admitted that she believed appellant wrongly disciplined her as a kid, and that K.T. admitted that she did not like appellant. Appellant's theme is that the girls had motivation to lie about appellant, the school photos made them appear younger than they were at trial, and the photos made them appear more earnest than appellant believes they were at trial.

Next, appellant argues that the circuit court erred by denying defense counsel's motion for a new trial because a juror slept most of the first day, and erred again when the court failed to subpoena the juror in question. Appellant argues there was no attempt to garner sufficient record of the individual juror's ability to reach a just verdict, and a subpoena for her testimony would have explicated the portions she missed, her ability to reach a fair verdict, or confirmation of sleeping or an inability to fulfill juror duties.

Finally, appellant contends that the evidence was insufficient to support his convictions. Appellant argues that S.T. and K.T.'s testimony was rife with inconsistencies and asks this Court to find, based on a lack of credibility, that the State failed to prove beyond a reasonable doubt that the appellant committed the crimes of which he was convicted.

As to appellant's burden-shifting argument, the State responds that the circuit court properly exercised discretion in overruling defense counsel's objection to the prosecutor's remark during closing argument. The State argues that the remark was a narrowly tailored

comment to which defense counsel opened the door.

The State points out that defense counsel called attention to the curvature of appellant's penis first through cross-examination of Ms. Scarborough, and that Ms. Scarborough did not offer that testimony before the defense prompted her description. The same question was not asked of the girls prior to their mother's testimony. The State further argues that defense counsel closed by using Ms. Scarborough's testimony to insinuate that her daughters were lying about the abuse, as they had not mentioned the unusual shape of the appellant's penis. The State argues that defense counsel opened the door for a response by making that comment and the remark did not place any evidentiary obligation onto the defendant. The State highlights that defense counsel did not question either girl about the shape of appellant's penis, and that the girls' young age limited any frame of reference or knowledge of what constitutes a genital oddity.

Responding to appellant's second argument, the State reasons that the circuit court properly exercised discretion when permitting the prosecution's introduction of a school photograph of each alleged victim. The State contends that the school photographs are relevant to trial proceedings since each photograph depicts the identity and age of each girl at the time of the alleged abuse, and the photographs help illustrate the difference in the nature and amount of force that might be used against a nine- or seven-year-old instead of an eighteen- or sixteen-year-old. The State further argues that the nine years between the photographs and the time of trial can be transformational, especially when that timeframe includes puberty. Here, the State maintains, photographs were evidence that provided the

jury with a more complete picture of the victims when the appellant allegedly abused them.

As to the third issue, the State responds that the court exercised discretion properly in denying appellant's motion for a new trial without issuing a subpoena to the purportedly sleeping juror. The State points out that defense counsel acknowledged he had not observed a sleeping juror and that he agreed the juror misconduct allegation was not brought to the court's attention when the court could have taken action to ameliorate the situation.

The State further contends that the record was sufficient for the circuit court to consider appellant's claim of juror misconduct without a subpoena. The State points to the court's discretion in determining credibility of the witnesses after hearing appellant's three family members testify, where the court ultimately decided that it was "not persuaded."

As to the fourth issue, the State maintains that the evidence was sufficient to support the judgment of convictions. The State urges that this case provided a consistent theme of testimony from each girl. According to the testimony of the girls, appellant took each one, individually and multiple times, up into his bedroom at night, placed his hand in her pants, digitally penetrated the vagina, and forced her to touch his penis. The State maintains that the *Kucharczyk* doctrine, cited and argued by appellant, actually only applies (and only should apply) when an individual's testimony is internally inconsistent to an unintelligible degree on the core facts determining criminality, and that the doctrine does not properly

apply to appellant’s case.¹ The State contends that the supposed inconsistencies between the alleged abuse and the evidence influences the weight of the evidence, not its sufficiency. The State argues that the alleged victims were afraid and threatened by appellant to not report the abuse, and so had not reported the incidents to the medical professionals that examined and treated the girls for various medical conditions or infections. The State further contends that, because the abuse went unreported, the treating physicians did not know that the girls were suffering from the additional physical and emotional factors accompanying sexual abuse. While there were inconsistencies in the testimony of S.T. and K.T., those inconsistencies do not affect the sufficiency of the evidence, according to the State.

III.

We are not persuaded that the circuit court erred. We shall address in turn

¹ *Kucharczyk v. State*, 235 Md. 334 (1964), held that a conviction for assault and battery required reversal for insufficient evidence where the prosecuting witness was the only person who testified as to *any overt act* on the part of Kucharczyk— and where that testimony was so contradictory that it lacked probative force. There, the prosecuting witness was severely mentally disabled, with an I.Q. of only 56, and testified twice on direct examination that nothing happened in a public lavatory (where the State alleged an assault occurred) after Kucharczyk gave him two drinks. On cross-examination, the prosecuting witness testified that nothing happened in a garage (where the State alleged the other assault occurred); and there were thus two unqualified statements by the prosecuting witness that the crime for which Kucharczyk was convicted never occurred. To the extent that there might remain any spark of vitality in the ashes of the *Kucharczyk* case, the doctrine would be confined to unresolved contradictions within a single witness’s trial testimony as to the central issue of the case. *Rothe v. State*, 242 Md. App. 272, 278 (2019). For more than fifty-five years, that *sui generis* fact pattern has never repeated itself. *Id.* at 279. See also *Bailey v. State*, 16 Md. App. 83, 93–102 (1972).

appellant’s contentions that the circuit court allowed an improper rebuttal closing argument, admitted improperly school photographs of the girls, abused discretion by denying a motion for new trial and declining to subpoena a juror whom appellant alleges slept at trial, and erred by allowing a judgment of conviction on insufficient evidence.

A.

We first address appellant’s claim of error and prejudice resulting from the State’s rebuttal closing argument. After defense counsel mentioned that the girls did not testify about distinguishing features of appellant’s genitals, the prosecutor pointed out in rebuttal closing that the girls were never asked about distinguishing features of such, and stated, “So it’s interesting that [defense counsel] only chose to ask Mrs. Scarborough because he wasn’t really sure what the girls would answer.” The issue is twofold: whether defense counsel opened the door to the rebuttal argument, and whether the State impermissibly shifted the burden of proof to the defense.

We review the propriety of argument or comment by counsel for abuse of the court’s discretion. *Mitchell v. State*, 408 Md. 368, 380–81 (2009). Of foremost importance, the burden remains on the State throughout the case to prove the defendant guilty beyond a reasonable doubt, and a defendant is under no obligation to prove his or her innocence. *Garrison v. State*, 88 Md. App. 475, 480 (1991). Whether the burden has shifted is a fact-intensive analysis.

In closing arguments at trial, courts allow liberal freedom of speech. *Wilhelm v.*

State, 272 Md. 404, 412 (1974), *abrogated on other grounds, as recognized by Simpson v. State*, 442 Md. 446, n.5 (2015). Yet this freedom is not boundless. Counsel for either side may not comment upon facts not in evidence. *Smith v. State*, 388 Md. 468, 488 (2005). It would be improper to invite the jury to draw inferences from information that was not admitted at trial. *See Spain v. State*, 386 Md. 145, 156 (2005). And permissible comments nevertheless may “open the door” to an argument by the other party that would not otherwise be allowed. *See Mitchell*, 408 Md. at 387–88. The prosecution is entitled to fairly respond to an argument by the defendant by referring to the defendant’s failure to produce evidence. *United States v. Robinson*, 485 U.S. 25, 34 (1988); *Marshall v. State*, 415 Md. 248, 266 (2010) (citing *Lee v. State*, 405 Md. 148 (2008)). A review of Maryland jurisprudence of “burden-shifting” leads to the conclusion the “Maryland appellate courts have not been quick to label prosecutorial closing comments on a shortage of defense evidence to be burden-shifting,” *Harriston v. State*, 246 Md. App. 367, 379 (2020).

Closing arguments are one applicable context for the “opened the door” doctrine. *Mitchell*, 408 Md. at 388. The “opened the door” doctrine permits a party to introduce evidence that otherwise might not be admissible, by way of response to certain evidence or arguments put forth by opposing counsel. *Id.* It is a fairness doctrine based on an opponent’s injection of an issue into the case. *Id.*

We agree with the State that the prosecutor’s remark was a narrowly tailored comment to which defense counsel opened the door. The State points out correctly that defense counsel first called attention to the curvature of appellant’s penis during the cross-

examination of Ms. Scarborough. We agree that Ms. Scarborough did not simply volunteer that testimony, but she was prompted by the defense. The same question was not asked of the alleged victims prior to their mother's testimony.

We agree also with the State's characterization of defense counsel's attacks on the credibility of the girls during closing argument, wherein counsel used Ms. Scarborough's testimony to insinuate that her daughters were lying about the abuse, as they had not mentioned the unusual shape of appellant's penis. Defense counsel opened the door for a response by making that comment; defense counsel injected the issue into the case, and it was not inappropriate for the State to remind the jury how the issue came about. The prosecutor permissibly told the jury that the girls were not asked about the shape of appellant's penis, and that young girls would ordinarily have very limited experience to volunteer information about what is odd or not in the shape of male genitals. The trial court did not abuse its discretion by allowing the rebuttal argument. No burden was shifted to appellant when the prosecutor mentioned the defense choice not to cross-examine the girls about the shape of appellant's penis.

B.

The circuit court's allowance of the school photographs was an evidentiary ruling that we review for abuse of discretion. *See Taneja v. State*, 231 Md. App. 1, 11 (2016). The court allowed one school photograph each for K.T. and S.T.

In determining whether to admit a photograph, a trial judge must decide whether the

photograph is relevant and, if so, whether its probative value is substantially outweighed by the danger of unfair prejudice. *Thompson v. State*, 181 Md. App. 74, 95 (2008), *aff'd* 412 Md. 497 (2010); Md. Rule 5-401; Md. Rule 5-403.

When S.T. and K.T. testified at appellant's trial, the girls were eighteen and sixteen, respectively. The admitted photographs depict the two girls around the time of the sexual abuse; S.T. was approximately nine or ten and K.T. was approximately seven or eight. The photos showed the identity and age of the girls at the time of the abuse. We agree with the State that the photos were relevant additionally to illustrate that the nature and amount of force used against the young children in the photos would be different than the force required to overpower the teenagers testifying at trial.

The two admitted photographs were school pictures of each girl, in shots portraying their head and shoulders. We agree with the State that the probative value of the photos outweighed any prejudicial value and that the trial court exercised its discretion properly to balance probative value against danger of unfair prejudice.

C.

Appellant claims that the trial court abused its discretion in denying the post-trial request to subpoena a juror and in denying the motion for a new trial. We disagree.

A ruling upon a motion for a new trial lies within the sound discretion of the trial court, and that ruling will not be disturbed except under the most extraordinary and compelling circumstances. *Jackson v. State*, 164 Md. App. 679, 695 (2005).

Although appellant argues now and argued below that a juror slept during the first day of trial, defense counsel acknowledged that he had not observed a juror sleeping. (Three of appellant’s relatives alleged that they saw a sleeping juror, but apparently none thought to mention it to anyone until one raised it in a letter to the judge commenting favorably upon appellant’s character before sentencing.) Defense counsel agreed with the court that the allegation of a sleeping juror was not brought to the court’s attention during trial, when the court might have replaced the juror with an alternate. On post-trial motion, the judge was clear in ruling as follows: “The Court is not persuaded that there was a sleeping juror that affected the rendering of the verdict.”

We reject appellant’s argument that the trial judge lacked a sufficient record to rule upon any alleged juror misconduct, and we reject the notion that the judge was required to subpoena the juror. The judge allowed testimony from the three family members who believed a juror had slept during trial. Of course, the judge was at the trial, and other officers of the court were present, including counsel for both sides. We lack the compelling reasons that would be necessary here to disturb the discretion of the trial judge.

D.

The last issue in this appeal is the sufficiency of the evidence. The test for the sufficiency of the evidence, and the standard of review, is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Haile v. State*, 431 Md. 448,

465 (2013). Thus, we defer to the trier of fact in assessing witness credibility, weight of evidence, and resolution of conflicts among evidence.

Appellant argues that the evidence is insufficient because of inconsistencies in the testimony of S.T. and K.T., because of medical testimony indicating that the medical issues observed could have had other causes besides sexual abuse, and because of other details related to the testimony of Ms. Scarborough and appellant. We are not persuaded.

In the case at bar, the combination of witness testimony and medical records would allow the trier of fact to find sexual abuse beyond a reasonable doubt, based upon reasonable inferences and credibility determinations. Two victims provided compelling testimony of sex abuse during their childhoods, some inconsistencies notwithstanding. Their mother's testimony supported the general consistency of the portrait of abuse. When S.T. was age nine or ten, she complained about bleeding in her vagina. Her mother thought that S.T. might have started her period, took her to a doctor, and the doctor did not think it was S.T.'s period, which in fact started years later. The State introduced medical records that reflected that S.T. visited her doctor in March 2011 and August 2011, seeking treatment on both occasions for vaginal bleeding and symptoms consistent with a bacterial infection that could have been caused by sexual contact with the hand of her stepfather, appellant. The State introduced medical records reflecting that the younger sister, K.T., visited her doctor in March 2011 and November 2011 for vaginal irritation and rectal irritation. These are just a few of the facts that could have supported a determination that appellant was guilty beyond a reasonable doubt — but these facts, when combined with

the details of the girls' testimony, are sufficient for a trier of fact to find guilt beyond a reasonable doubt. The jury easily could have determined, and apparently did determine, that the girls' stories were fundamentally credible and consistent with sexual abuse, and that any inconsistencies, such as K.T.'s recollection of the exact age at which she began to sleep with her mother, were comparatively minor lapses in memory that did not impugn the veracity of the core testimony.

We agree with the State that *Kucharczyk*, 235 Md. at 334, is not apposite to the case at bar and not controlling. See *Rothe*, *supra* note 1, 242 Md. App. at 278; *Bailey*, *supra* note 1, 16 Md. App. at 93–102. *Kucharczyk* applies rarely. The trier of fact is capable of taking contradictions, equivocations, and other challenges properly into account and then assessing credibility and weighing testimony in an informed manner. *Id.* at 98.

The evidence was sufficient for the jury to find that appellant was guilty beyond a reasonable doubt of all elements of the crimes of which he was convicted.

**JUDGMENTS OF THE
CIRCUIT COURT FOR
WICOMICO COUNTY
AFFIRMED; COSTS TO BE
PAID BY APPELLANT.**