Circuit Court for Frederick County
Case No. C-10-CR-21-000611

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 896

September Term, 2022

EVELYN GOMEZ GUTIERREZ

v.

STATE OF MARYLAND

Friedman,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: July 5, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

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

A jury in the Circuit Court for Frederick County found Evelyn Gomez Gutierrez ("appellant") guilty of one count of second-degree rape and two counts of third-degree sexual offense. The court sentenced appellant to a total term of 30 years of incarceration, with all but 7 years suspended. Appellant noted this timely appeal. On appeal, appellant contends that the court erred by admitting the victim's testimony relating to uncharged sexual contact by the appellant.[1] For the reasons to follow, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was arrested and charged with engaging in vaginal intercourse with her friend's minor son, "L."[2] At trial, L., who was born in February of 2007, testified that appellant had sexual intercourse with him on three different occasions in 2020. According to L., the first instance occurred in March of 2020 in the living room of his parents' home. On that occasion, L. was watching a movie alone when appellant, who was staying the night at L.'s home, sat next to and started kissing him. L. testified that appellant then had vaginal intercourse with him.

L. testified that the second instance occurred in November of 2020, also at L.'s parents' home. On that occasion, L.'s mother was not at home and L. asked appellant if she wanted to have sex. The two went into the laundry room and appellant had vaginal intercourse with L.

L. testified that the third incident occurred at appellant's home after appellant picked

[1] Rephrased from: "Did the trial court err by admitting L's testimony relating to uncharged sexual contact by Appellant?"

[2] To protect the minor's identity, we refer to him as "L."

L. up from school. On that occasion, the appellant drove L. to appellant's home and had vaginal intercourse with him in appellant's bedroom. L. could not recall exactly when the third incident occurred, although he testified that it "was still 2020."

In addition to L.'s testimony, the State presented testimony from several other witnesses. L.'s pediatrician testified that L. had come to her office in 2021 for a yearly physical. During that exam, L. reported that he had been sexually active with an adult. L.'s pediatrician later disclosed that information to Child Protective Services ("CPS").

A CPS investigator testified that she subsequently interviewed L. During that interview, which was recorded and played for the jury, L. stated that appellant had sexual intercourse with him three times in 2020. L. provided additional details regarding two of the incidents, stating that one of the incidents occurred at his parent's home while he was watching a movie and that another incident occurred in the home's laundry room.

A Frederick City Police Detective testified that she also interviewed L. and that, during that interview, L. reported that appellant had sexual intercourse with him on three occasions. According to the Detective, L. stated that the first incident occurred at L.'s home while he was watching a movie. The Detective testified that he eventually discussed the matter with L.'s mother, and she agreed to participate in a recorded phone conversation with appellant. During that conversation, appellant admitted to having inappropriate contact with L. on at least one occasion.

"Prior Bad Act" Evidence

As noted, appellant was charged with one count of second-degree rape and two counts of third-degree sexual offense. In the indictment, the State alleged that the second-

degree rape offense (Count 1) had occurred on or about March 1, 2020 through March 31, 2020. For one of the counts of third-degree sexual offense (Count 2), the State alleged that the act had occurred on or about April 1, 2020 through April 30, 2021. For the other count of third-degree sexual offense (Count 3), the State alleged that the act had occurred on or about May 1, 2021 through May 31, 2021. For both counts of third-degree sexual offense, the State alleged that appellant had violated section 3-307 of the Criminal Law Article of the Maryland Code ("CL"). That statute prohibits "engag[ing] in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim[.]" CL § 3-307(a)(3). The statute defines "sexual contact" as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CL § 3-301(e)(1). The statute also prohibits "engag[ing] in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old[.]" CL § 3-307(a)(5).

As discussed, L. testified at trial that appellant had engaged in three separate incidents of vaginal intercourse with him in 2020, when he was 13 years old. The first instance occurred in March of 2020 in the living room of his parents' home. The second instance occurred in November of 2020 in the laundry room of his parents' home. The third incident occurred sometime in 2020 at appellant's apartment.

Following that testimony, the State asked L. if there were any other incidents appellant had sexual contact with him. After L. responded in the affirmative, appellant objected and requested a bench conference. At that bench conference, the following

colloquy ensued:

> [DEFENSE]: Your Honor, the indictment in this case covers second-degree rape and two counts of . . . third degree assault which comport with the alleged other two sex acts. By testifying to anything beyond those, it's more prejudicial than probative and in fact could convince jurors –
>
> THE COURT: It's another crime, it's some type of testimony.
>
> [DEFENSE]: Yes, exactly.
>
> * * *
>
> [STATE]: A third degree sex offense can also include sexual contact when the victim is 14 and the defendant is over the age of 21. So, there's the third-degree sex offenses I don't think are limited to vaginal intercourse, there could also be sexual contact.
>
> * * *
>
> THE COURT: . . . You're risking yourself coming back, you know that. Because I think it's just opening the door to other [] evidence. Tell me what he's going to say. There are the things, [] you're going to ask him about occurring afterwards or before?
>
> [STATE]: They're occurring within the first time of sex and the last time of sex. It's within that timeframe is my understanding.
>
> * * *
>
> THE COURT: Why wouldn't it be a common scheme or common plan?
>
> [DEFENSE]: Because it's not charged that way, number one.
>
> THE COURT: . . . We're talking about the (unintelligible) for other bad acts.
>
> [DEFENSE]: Well, they're not prior bad acts.
>
> THE COURT: Well, they are to someone. If she –
>
> [DEFENSE]: But at that point you're, I guess the best way to say it is again, I go back to it seems the State, they're now throwing out a net as opposed to using a fishing rod.

> THE COURT: I don't think she can argue it the way she articulated. I think she can say, if you'd see it at least, there was a sexual relationship but it wasn't just this three time[s] of sexual intercourse, there's a sexual relationship between these people that was ongoing during this time by virtue of these other things. I don't think you can say, but you can pick one of those out and find him guilty of it.
>
> [DEFENSE]: That's exactly what she's doing.
>
> THE COURT: I'm not going to let her do it. I'm not going to let you do it. But I think in terms of this being common between the two of them during this time, I'm going to allow [you] to ask the question.

When L. resumed testifying, the State again asked if there were any other incidents of sexual contact. After appellant renewed his objection, L. testified that appellant used to pick him up from school and drive him home. L. testified that, during those trips, L. would put his hand on appellant's thigh and she would stroke his penis over his clothes. L. testified that it happened approximately 15 to 20 times. Although L. did not specify when those acts had occurred, he had previously testified that the incident of vaginal intercourse in March of 2020 was the "first time anything sexual" had occurred between him and appellant. L. later testified that he and appellant "stopped having sex" after the third instance of vaginal intercourse, which also occurred in 2020.

During cross-examination, appellant questioned L. about the delay between when the sexual acts took place and when he finally disclosed those incidents to his doctor and the police. Appellant asked L. if he had reported the incidents because appellant "wasn't paying attention" to him and he "wanted her in trouble." Appellant also questioned L. about certain discrepancies between his trial testimony and his reports to the police regarding the second and third instances of sexual intercourse.

Later, the trial court instructed the jury as to the elements of the charged

crimes:

> The defendant is charged with the crime of second degree rape. In order to convict the defendant of second degree rape the State must prove, one, that the defendant had vaginal intercourse or unlawful penetration with [L.] Two, that [L.] was under 14 years of age at the time of the act. And three, that the defendant was at least four years older than [L.]
>
> * * *
>
> The defendant is charged with . . . two counts of the crime of third degree sexual offense. In order to convict the defendant of third degree sex offense, the State must prove, one, that the defendant engaged in a sexual act with [L.] Two, that [L.] was 14 or 15 years of age at the time of the act. And that the defendant was at least 21 years old at the time of the act.
>
> A sexual act means . . . vaginal intercourse or unlawful penetration.
>
> * * *
>
> And just so we're clear, you have to decide [were] there three elements of the vaginal intercourse or unlawful penetration. That's what you're deciding. You heard testimony about some other touching and things and what have you, that's part of the whole package of evidence of things, whether you believe it or you don't believe it, and for you to discuss among yourselves but they do not comprise an element of the crime.

Immediately after giving that instruction, the trial court held a bench conference and asked the parties if they had any objections to the instructions. The State asked the court to add, in its instruction regarding the elements of third-degree sexual offense, that the jury could also find appellant guilty of those charges if it found that L. and appellant had "sexual contact" when L. was under 14 years of age. The State noted that there was some confusion regarding when the two latter incidents of sexual intercourse occurred and that, if the jury concluded that L. was under the age of 14 at the time of those incidents, the jury could not find appellant guilty of the two charges of third-degree sexual offense based on the court's prior instruction. The court ultimately agreed and provided the following supplemental

instruction to the jury:

> One more instruction. Sexual contact, the defendant is, as I've said, charged with two counts of third degree sexual offense. In order to convict the defendant of third degree sexual offense, I've given you the elements but there are also additional elements.
>
> The defendant had sexual contact with [L.], that [L.] was under 14 years of age at the time of the act and that the defendant is at least four years older than [L.]
>
> Sexual contact means the intentional touching of [L.'s] genital or anal area or other intimate area for the purpose of sexual arousal or gratification or for the abuse of either party.
>
> * * *
>
> Now this is a little confusing, but I'll try and unconfuse you here. The Count 2 is over a long period of time, that spans both between when he was 13 and when he was 14. You have to first decide on each count, did in fact the sexual intercourse take place. And if it took place, when did it happen. Although when is not actually an element, it's an element [] of his age. Was he 13 or was he 14, which applies to the second count of third-degree sexual, 13 for the second-degree rape, 14 for the third count. [So] you have to consider if the second count did happen. And if you decide [that] it did, was [he] 14 or 13 [during the] sexual contacts.

Later, during closing argument, the State emphasized that the three incidents of vaginal intercourse, and not the incidents of uncharged sexual contact that had occurred in appellant's vehicle, were the bases for the three charges:

> So what are the elements that I have to prove? For second degree rape, which is going to be the first charge on your verdict sheet, these are the elements that you have to agree upon. The defendant had vaginal intercourse, or unlawful penetration with [L.], that [L.] was under 14 at the time of the acts, and the defendant was at least four years older than [L.] . . . So, this is the March 2020 incident. This is the first time in the living room. So, at the time, March of 2020, [L.] was 13, and the defendant was 41. So, [L.] was under 14, the defendant was more than four years older.
>
> Third-degree sexual offense. So, these are the next two charges you

> will see on your verdict sheet. So, the State has to prove the defendant engaged in vaginal intercourse, or a sexual act, that he was 14 or 15, and the defendant was at least 21. . . . [A]nd then you can also find a third sexual offense if there was sexual contact, [L.] was under 14, and the defendant was at least four years older. . . . Engaging in vaginal intercourse is included in sexual contact. . . . So, when you get your verdict sheet, like I said, the first one is going to be that rape charge for that first March incident where [L.] was 13, and the defendant was 41. The second count on the verdict sheet is going to be a count of third degree sex offense, and you are going to see these dates on it. April 1st, 2020 through April 30th, 2021. This is for the incident at the defendant's apartment. The second versus third in the timeline does not matter.
>
> Okay, so, it doesn't, you guys do not all have to agree that the incident in the apartment was the second time. All you have to agree was that there were three times that they engaged in sexual intercourse, that's all you have to agree on. You do not have to agree that the laundry room incident was second, or the laundry incident was third.
>
> * * *
>
> Count three on your verdict sheet is going to look like this. May 1st, 2021 through May 31st, 2021. So, this is for the incident in the laundry room. Again, whether the laundry room incident was second, or whether the laundry room incident was third does not matter.
>
> * * *
>
> So, again, second-degree rape in the living room, March 2020, third degree sexual offense for the defendant's apartment, and third degree sexual offense for the laundry room, and if you believe that it's been proven beyond a reasonable doubt, that the defendant and [L.] engaged in sexual intercourse on all three occasions, the defendant is guilty of all three counts.

Appellant was ultimately convicted on all counts. Additional facts will be included as they become relevant to the issues.

DISCUSSION

A. Parties' Contentions

Appellant contends that the trial court erred in permitting L. to testify that, on

multiple occasions while driving L. home from school, L. put his hand on appellant's thigh while appellant stroked his penis. Appellant asserts that, because the conduct at issue constituted "prior bad act" evidence, the evidence was inadmissible under Maryland Rule 5-404(b), which prohibits evidence of criminal propensity. Appellant contends that the court's reliance on the "common scheme" exception to Rule 5-404(b) was improper because, not only was there no evidence of a "grand plan," the conduct at issue was too dissimilar to the incidents of vaginal intercourse to establish a common scheme. Appellant argues that, before admitting the evidence, the court failed to find that the conduct had been proven by clear and convincing evidence and that the evidence's probative value outweighed the potential for unfair prejudice.[3] Appellant also argues that, irrespective of the lack of express findings by the court, the evidence "was too vague and unspecified to have provided a basis for the court to find that the conduct was proven by clear and convincing evidence" and "was so different from the acts charged that the danger of unfair prejudice substantially outweighed its probative value."

The State contends that the trial court did not err in admitting L's testimony regarding the instances of uncharged sexual contact. The State argues that the evidence did not constitute "prior bad act" evidence because the conduct at issue was part of an indivisible, continuing course of sexual abuse. The State further argues that, even if the

[3] The State argues that this claim is partly unpreserved because, at trial, appellant objected on specific grounds that did not include the court's lack of findings regarding whether the prior bad act had been proven by clear and convincing evidence. We disagree. Although appellant did initially object to the evidence on specific grounds, she later lodged a more general objection when the court ultimately decided to admit the evidence because it showed a "common scheme." We are persuaded that appellant's renewed objection was sufficient to preserve the issue. *See* Md. Rule 8-131(a).

conduct was "prior bad act" evidence, the evidence was admissible under either the common law "sexual propensity" exception or several other recognized exceptions to Rule 5-404(b)'s general prohibition against the admission of prior bad act evidence. Finally, the State argues that, even if the court erred in admitting the evidence, any error was harmless.

B. Analysis

At the outset, we note that the uncharged conduct did, contrary to the State's argument, constitute "prior bad act" evidence. A prior bad act "is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Vigna v. State*, 241 Md. App. 704, 728 (2019) (internal quotation marks omitted) (quoting *Brice v. State*, 225 Md. App. 666, 692 (2015)). Clearly, L.'s testimony regarding the multiple instances of uncharged sexual contact between him and appellant would, under the circumstances, likely impugn or reflect adversely upon appellant's character. Thus, the testimony concerned a "prior bad act." Moreover, appellant was not charged with having committed an indivisible, continuing course of sexual abuse against L. Rather, appellant was charged with one count of second-degree rape and two counts of third-degree sexual offense based on three specific incidents, *i.e.*, the three incidents of vaginal intercourse, that were separate and distinct from the uncharged sexual activity that occurred in appellant's vehicle.

We turn to the merits of appellant's claims. Maryland Rule 5-404 prohibits the admission of "other crimes, wrongs, or other acts . . . to prove the character of a person in order to show action in the conformity therewith." Md. Rule 5-404(b). "Evidence of other crimes may be admitted, however, if it is substantially relevant to some contested issue in

the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989).

Before admitting "prior bad act" evidence, a trial court is required to engage in a three-part analysis. *Darling v. State*, 232 Md. App. 430, 463 (2017). First, the court must determine whether the evidence qualifies under an exception to Rule 5-404(b). *Id.* That determination is a legal one that we review *de novo*. *Stevenson v. State*, 222 Md. App. 118, 149 (2015). Second, the court must determine whether the defendant's involvement in the prior bad act is established by clear and convincing evidence. *Vigna*, 241 Md. App. at 727. We review that determination under the clearly erroneous standard. *Oesby v. State*, 142 Md. App. 144, 164-65 (2002). A determination is clearly erroneous if there is no competent evidence to support it. *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 339 (2017). Third, "the court must find that the probative value of the evidence outweighs any unfair prejudice." *Darling*, 232 Md. App. at 463. That determination is reviewed for abuse of discretion. *Vigna*, 241 Md. App. at 727. "[A]n abuse of discretion occurs when the court acts without reference to any guiding rules or principles, where no reasonable person would take the view adopted by the court, or where the ruling is clearly against the logic and effect of facts and inferences before the court." *Brown v. State*, 470 Md. 503, 553 (2020) (internal quotation marks omitted) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)).

1. Exception to Rule 5-404(b) – Special Relevance

Evidence of a defendant's prior bad acts may be admitted if it has "special relevance–that it is substantially relevant to some contested issue." *Stevenson*, 222 Md. App. at 149 (internal quotation marks omitted) (quoting *Wynn v. State*, 351 Md. 307, 316

(1998)). Under Rule 5-404(b), prior bad act evidence has special relevance if it shows "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, [or] absence of mistake or accident[.]" Md. Rule 5-404(b). That list is not meant to be exhaustive, but instead is a useful tool for classifying "those areas where evidence has most often been found admissible." *Solomon v. State,* 101 Md. App. 331, 353 (1994) (internal quotation marks omitted) (quoting *Harris v. State*, 324 Md. 490, 498 (1991)). In other words, "the recognized 'exceptions' to the exclusionary rule . . . [are] a representative list of examples in which evidence has been found to meet the exception to the general rule of exclusion; it is not a laundry list of finite examples." *Harris,* 324 Md. at 501. The ultimate question, therefore, is not whether the other crimes evidence fits neatly into one of the aforementioned categories; instead, the question is whether the other crimes evidence is "substantially relevant for reasons other than criminal character[.]" *Solomon,* 101 Md. App. at 356. In short, "[t]he label we put on an exception . . . is not that important, just so long as the evidence of 'other crimes' possesses a special or heightened relevance and has the inculpatory potential to prove something other than that the defendant was a 'bad man.'" *Oesby*, 142 Md. App. at 162.

We hold that the trial court did not err in admitting the disputed evidence under the "common plan or scheme" exception to Maryland Rule 5-404(b).[4] "Wrongful acts planned and committed together may be proved in order to show a continuing plan or common

[4] Given our determination that the uncharged sexual conduct was properly admitted under Maryland Rule 5-404(b), we decline to address whether the conduct could have also been admitted under the common law sexual propensity exception which was neither raised nor addressed in the trial court.

scheme[.]" *Emory v. State*, 101 Md. App. 585, 613 (1994) (citations omitted). "[T]o establish the existence of a common scheme or plan, it is necessary to prove that the various acts constituting the offenses naturally relate to one another by time, location, circumstances and parties so as to give rise to the conclusion that they are several stages of a continuing transaction." *Id.* (quoting *State v. Jones*, 284 Md. 232, 243 (1979)). The relationship between the acts must "support the inference that there exists a single inseparable plan encompassing both the charged and uncharged crimes, typically, but not exclusively, embracing uncharged crimes committed in order to effect the primary crime for which the accused has been indicted." *Cross v. State*, 282 Md. 468, 476 (1978) (internal quotation marks omitted) (quoting *People v. Fiore*, 356 N.Y.S.2d 38, 42–43 (1974)). In other words, "there must be a causal relation or logical or natural connection among the various acts or they must form part of a continuing transaction to fall within the exception." *Jones*, 284 Md. at 244.

In the instant case, appellant was charged with having sexual intercourse with L. on three occasions over several months. L. testified that two of those incidents occurred at his house and that the third incident occurred after appellant had driven L. to her home. L. also testified that, on multiple occasions, L. had put his hand on appellant's thigh and appellant stroked L.'s penis while driving him home from school.

We are persuaded that the uncharged sexual conduct, *i.e.*, the inappropriate touching in appellant's vehicle, was relevant in establishing a common plan. The conduct was sexual in nature, involved the same victim, and occurred during the time that the charged crimes occurred. Those circumstances supported an inference that appellant committed the

uncharged conduct in an effort to effectuate the charged crime of vaginal intercourse. Appellant's acts while driving L. home from school, considered in conjunction with the one instance of vaginal intercourse occurring after appellant drove L. to her home, clearly suggested that appellant was engaged in a continuing transaction of vaginal intercourse with L. The "plan" was to have vaginal intercourse with L. on multiple occasions over a period of several months. The uncharged acts support the conclusion that in order to carry out that plan, appellant engaged in sexual conduct with L. while driving him home from school. Evidence of that conduct was therefore admissible.

Even if the disputed evidence was not admissible under the "common plan" exception, we are convinced that the evidence had "special relevance" and was therefore admissible as an exception to Rule 5-404(b).[5] Through cross-examination at trial, appellant suggested that she had spurned L.'s sexual advances and that L. had ultimately reported the vaginal intercourse to "get[] [her] in trouble." L.'s testimony regarding the incidents in appellant's vehicle refuted that insinuation and provided context for the relationship. *See Merzbacher v. State*, 346 Md. 391, 410 (1997) (permitting the admission of other crimes evidence to show that the crime of sexual abuse "was not an isolated incident devoid of setting"). Appellant questioned L. as to why it took so long for him to report the abuse during cross-examination. L.'s testimony regarding the incidents in appellant's vehicle, which established appellant's eagerness to maintain an ongoing sexual relationship with

[5] Even though the court only admitted the challenged evidence under the "common plan" exception to Rule 5-404(b), we may affirm the court's ruling if the evidence had any "special relevance" to the case. *See Parker v. State*, 402 Md. 372, 398 (2007) (recognizing that "on direct appeal, an appellate court will ordinarily affirm on any ground adequately shown by the record").

L., was also relevant in explaining that delay. *See id.* at 409 (citing *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (finding compelling the admission of other crimes evidence to explain the victim's delay in reporting abuse)).

2. Clear and Convincing

"Clear and convincing evidence means that the witness to a fact must be found to be credible, and that the facts to which [she] ha[s] testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." *Cousar v. State*, 198 Md. App 486, 514–15 (2011). L. testified to the specifics of the conduct at issue. There is no indication in the record that L.'s testimony was insufficient to establish the prior bad acts by clear and convincing evidence. The court was not required to place its determination on the record. *Emory*, 101 Md. App. at 623–24; *see also State v. Chaney*, 375 Md. 168, 181–85 (2003) (judges are presumed to know the law and apply it correctly).

3. Probative Value vs. Undue Prejudice

The trial court did not abuse its discretion in admitting the disputed evidence. As discussed, the uncharged sexual conduct involved the same victim and occurred during the time that the charged crimes occurred. The conduct was relevant in establishing appellant's "plan" to commit the charged crimes and in providing context for appellant and L.'s relationship during the time the charged crimes occurred. The conduct was also relevant in refuting several insinuations made by appellant during L.'s cross-examination. Accordingly, the evidence's probative value outweighed any undue prejudice that may

have resulted from its admission. We again note that the court was not required to place this specific finding on the record. *See Darling*, 232 Md. App. at 463 (noting that a court is not required to place its balancing test on the record).

4. Harmless Error

Assuming, *arguendo*, that the trial court erred in admitting the disputed evidence, any error was harmless. An error is harmless when "the reviewing court is convinced, beyond a reasonable doubt, that the error in no way influenced the jury's verdict." *Gross v. State*, 481 Md. 233, 237 (2022).

First, the court's instructions to the jury minimized the risk that the jury would consider the uncharged conduct improperly. *See Tirado v. State*, 95 Md. App. 536, 553–54 (1993) (error in the admission of "other crimes" evidence was cured by court's instruction to jury). The court informed the jury that, to convict appellant of the charged crimes, it was required to find that appellant and L. had engaged in vaginal intercourse or unlawful penetration. The court then stated that, while the jury had heard testimony about "some other touching," such evidence was merely "part of the whole package of evidence" and should not be considered as an element of any of the charged crimes. That instruction made clear that the jury could not find appellant guilty based on the uncharged conduct. Although the court subsequently modified its instruction regarding the elements of the charged crimes to include "sexual contact," which could have encompassed the uncharged conduct, we do not read that modification as altering the court's prior instruction regarding the manner in which the jury should and should not consider the uncharged conduct in relation to the charged crimes.

To the extent that the court's supplemental instruction confused the issue as to which acts could sustain a guilty verdict, the State afterward alleviated any confusion in its closing argument. *See Yates v. State*, 202 Md. App. 700, 711 (2011) (noting that, in a harmless error analysis regarding the erroneous admission of evidence, an appellate court considers how the State used the inadmissible evidence). During closing argument, the State clarified that the jury could not find appellant guilty of the three charges unless it was convinced beyond a reasonable doubt that the three acts of vaginal intercourse had occurred. At no point did the State argue, or even suggest, that the uncharged conduct could sustain a guilty finding.

Finally, the introduction of the uncharged conduct was cumulative to the collective evidence in support of the three charges. *Dove v. State*, 415 Md. 727, 744 (2010) ("[C]umulative evidence tends to prove the same point as other evidence presented during the trial or sentencing hearing."). Although the uncharged sexual conduct was relevant to establishing a common plan, refuting any insinuation that L. reported appellant to "get[] [her] in trouble," and explaining L.'s delay in reporting the abuse, we are convinced beyond a reasonable doubt that "there was sufficient evidence, independent of the [evidence] complained of, to support the appellant['s] conviction." *See id.* at 744–45 (quoting *Richardson v. State*, 7 Md. App. 334, 343 (1969)); *Dionas v. State*, 436 Md. 97, 117 (2013) ("To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record."). L. testified, in detail, that he and appellant had engaged in three incidents of vaginal intercourse in 2020. That testimony was then corroborated by the CPS

investigator and police detective, both of whom testified that L. told them that he and appellant had sexual intercourse three times. L.'s interview with the CPS investigator was recorded and played for the jury. During that interview, L. stated that appellant had sexual intercourse with him three times in 2020. Finally, Appellant herself admitted to L.'s mother during a recorded conversation over the phone that she had engaged in at least one instance of sexual conduct with L. Hence, we are convinced beyond a reasonable doubt that the jury's verdict would not have been different had the uncharged conduct been excluded.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.