Circuit Court for Montgomery County
Case No. 137149C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1093

September Term, 2021

JHIMY JOSUE MEJIA-PINEDA

v.

STATE OF MARYLAND

Berger,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: July 27, 2022

Jhimy Mejia-Pineda, appellant, was accused of sexually abusing a minor child, "E." A jury, in the Circuit Court for Montgomery County, subsequently convicted Mr. Pineda of sex abuse of a minor, two counts of second-degree rape, two counts of second-degree sex offense, and third-degree sex offense. The court sentenced Mr. Pineda to a total term of 56 years' imprisonment. In this appeal, Mr. Pineda presents three questions, which we have rephrased for clarity. They are:

1. Did the trial court err in permitting the State, during rebuttal closing argument, to comment on Mr. Pineda's failure to call certain witnesses?

2. Did the trial court err in allowing E. and E.'s mother to testify about an incident involving E. and Mr. Pineda that was not charged in the indictment?

3. Was the evidence adduced at trial sufficient to sustain Mr. Pineda's convictions of second and third-degree sexual offense?

For reasons to follow, we hold that the trial court did not err in permitting the disputed comment or in allowing the disputed testimony. We also hold that the evidence was sufficient to sustain Mr. Pineda's convictions. Accordingly, we affirm the court's judgments.

BACKGROUND

E. was born in March 2007 and is related to Mr. Pineda by marriage. In 2019, when she was approximately 12 years old, E. informed her mother that, over the previous several years, Mr. Pineda had been engaging in inappropriate sexual conduct with her. In March 2020, Mr. Pineda was charged by indictment with one count of sex abuse of a minor, two counts of second-degree rape, two counts of second-degree sex offense, and one count of

third-degree sex offense. The indictment stated that all acts had occurred "on or about and between March 19, 2013 and March 18, 2016[.]"

Trial

E., who was 14 years old and in the eighth grade at the time of trial, testified that Mr. Pineda began living with her when she was in first grade. E. testified that she also lived with her mother, her younger brother, her two older brothers, and her older sister.

E. testified that, while she was in first grade, Mr. Pineda would sometimes pick her up from school. E. testified that, on one occasion, while they were driving home from school, Mr. Pineda put his hand in her pants and touched her vagina.

E. testified regarding another incident that had occurred when she was in first grade. That incident transpired while E. and Mr. Pineda were alone in Mr. Pineda's bedroom. During the incident, Mr. Pineda told E. to take off her clothes, which she did. Mr. Pineda then pulled down his pants and put his penis in E.'s vagina. E. testified that she remembered similar incidents occurring "multiple times" while she was in first grade. E. testified that she remembered another incident, which also occurred when she was in first grade, when Mr. Pineda touched her "butt."

E. testified regarding an incident that had occurred while she was in "second through fifth grade[.]" During that incident, which occurred at home, Mr. Pineda pulled down E.'s pants and "started licking [her] vagina."

E. testified regarding several other incidents. During one incident, Mr. Pineda put his hand down E.'s pants and digitally penetrated her vagina while the two were at a local pool. During another incident, which occurred at home, Mr. Pineda touched E.'s breast.

During a third incident, while Mr. Pineda and E. were at a mall shopping for a Barbie doll, Mr. Pineda put his hand down E.'s pants and digitally penetrated her vagina. Regarding those incidents, E. did not provide any specific time frame for when they had occurred.

E. testified that, aside from one later incident in which Mr. Pineda touched her thigh, Mr. Pineda stopped touching her inappropriately when she got into sixth grade. E. testified that she eventually told her mother about the various incidents involving Mr. Pineda. E. testified that her mother took her to the doctor the following day for an examination.

On cross-examination, E. was asked about the timing of the incident at the pool, the incident at the mall, and the incident in which Mr. Pineda touched her breast. E. reiterated that she could not remember exactly when those incidents occurred. Regarding the breast incident, E. was asked if it was "after March 2016[.]" E. responded in the affirmative, adding that she could not remember how long after March 2016 the incident had occurred.

E.'s mother testified that E. was between six and nine years old when she attended second through fifth grade at a local elementary school. E.'s mother testified that, in November 2019, she had a conversation with E. about "what happened to her." E.'s mother testified that she took E. to the doctor the following day for a checkup. Upon taking E. to the doctor, E.'s mother had a telephone conversation with her adult son, and, during that conversation, she informed him about the abuse. E.'s mother testified that, following that conversation, Mr. Pineda called her on her cell phone five times over an 18-minute period. E.'s mother testified that it was unusual for Mr. Pineda to try to contact her that many times over a short period.

Mr. Pineda, who was born in December 1991 and was 29 years old at the time of trial, testified in his own defense. He denied all allegations.

Mr. Pineda was subsequently convicted. Additional facts will be supplied below.

DISCUSSION

I.

Mr. Pineda's first claim of error concerns remarks made by the prosecutor during the State's rebuttal closing argument. Those comments came after defense counsel had made certain comments during his closing argument regarding the State's failure to call several witnesses, including other family members who had lived in the home with E. and Mr. Pineda during the times E. alleged the sexual abuse had occurred:

> And I'm not faulting anyone for not remembering what happened six years ago, seven years ago. That's difficult. But the number of I don't remembers and the significance of getting defensive, stories that just don't add up. Why wouldn't the State have called [E.'s brother]? Or her other twin brother[?] Or her sister[?] [I]t's their burden. Why didn't they call any of these people[?]
>
> * * *
>
> Ladies and gentlemen of the jury, the number of people that lived at each address, my client's work schedule, witnesses that testified to his work schedule. It's just not even possible that he would have had the opportunity to commit these crimes.
>
> * * *
>
> And if [E.'s brother] is so important, according to the State in her own closing, if [E.'s brother] is so important, why didn't you call him as a witness? You know where he lives. Why didn't you call him? Why didn't you call his brother? Why didn't you call anyone else who lived in the home?
>
> All of these people are accessible to the State[.] [W]hy didn't they call these people who are apparently so key to the case?

* * *

> Think about all the questions that you have in your mind right now. Why didn't you call this person, why didn't you send in school records, the detectives, other possible family members, the t-shirt? Because this never happened. That's why.

At the conclusion of defense counsel's closing argument, the prosecutor gave a rebuttal argument and made the following comments:

> There's also a lot made out of – in closing argument about where the twin brothers, where was [the police detective], where was [E.'s sister].
>
> These individuals were not present when this individual took . . . [E.] into his room, took her on the ride to the neighborhood after being picked up from school. They weren't present to physically see those things. There's no need to parade witnesses in front of you, when you have the victim testifying under oath, and telling you exactly what happened to them.
>
> **And if they thought they were significant, they had an opportunity to call them as witnesses as well.**
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled. It's argument.

Mr. Pineda now claims that the trial court erred in overruling defense counsel's objection to the prosecutor's comment. Mr. Pineda claims that it was improper for the prosecutor to comment on his failure to call witnesses, as doing so constituted impermissible burden-shifting. Mr. Pineda claims further that "[i]t cannot be seriously argued that [defense counsel]'s closing argument invited or opened the door to the State's [disputed comment]." He asserts that any comment made by defense counsel regarding the State's failure to call certain witnesses was made in response to arguments made by the State during its initial closing argument, in which the prosecutor suggested that Mr. Pineda

had engaged in "suspicious" behavior after E. disclosed the incidents of abuse to her mother.

The State argues that the prosecutor's comment was not improper, but instead was an appropriate response to defense counsel's arguments regarding the State's failure to present certain witnesses. The State argues further that, even if the prosecutor's comment was improper, reversal is unwarranted because the comment was harmless.

"The State is prohibited under the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights from commenting on a defendant's decision to not testify at trial." *Molina v. State,* 244 Md. App. 67, 174 (2019). A defendant's constitutional right not to testify may also "be implicated by a prosecutor's attacks on a lack of evidence provided by the defense[.]" *Harriston v. State,* 246 Md. App. 367, 372-73, *cert. denied,* 471 Md. 77 (2020). "Indeed, the Court of Appeals has observed that a prosecutor's comment on a 'defendant's failure to produce evidence to refute the State's evidence … might well amount to an impermissible reference to the defendant's failure to take the stand.'" *Molina,* 244 Md. App. at 174 (quoting *Eley v. State,* 288 Md. 548, 556 n.2 (1980)).

Similarly, "Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Wise v. State,* 132 Md. App. 127, 148 (2000). "[B]urden-shifting claims, made in response to prosecutorial comments on a lack of evidence supporting the defense, are borne out of the defendant's constitutional right to refrain from testifying." *Harriston,* 246 Md. App. at 372.

That said, a prosecutor's comment on a defendant's failure to produce evidence will not always constitute improper burden-shifting or an improper attack on the defendant's constitutional right not to testify. *See, e.g., Molina,* 244 Md. App. at 174; *Wise,* 132 Md. App. at 142-43. As the Court of Appeals held in *Mitchell v. State,* 408 Md. 368 (2009), such a comment may be permissible when defense counsel "opens the door" by commenting on the State's failure to call certain witnesses. *Id.* at 387-93. The Court explained that, where defense counsel, during closing argument, notes the absence of certain witnesses and then emphasizes the fact that the State had the power to subpoena those witnesses, thereby implying that the jurors were entitled to see those witnesses but were somehow prevented from doing so by the State, the prosecutor is entitled to respond in rebuttal that the defense also had the power to call those witnesses and failed to do so. *Id.* at 388-89.

Furthermore, we ordinarily "grant attorneys, including prosecutors, a great deal of leeway in making closing arguments[,]" *Whack v. State,* 433 Md. 728, 742 (2013), and we consider the bounds of permissible argument in light of the facts of each case. *Mitchell,* 408 Md. at 380. We also defer to the judgment of the trial court in that regard, as the trial court "is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Whack,* 433 Md. at 742. We therefore will "not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Mitchell,* 408 Md. at 381 (quotation marks and citation omitted).

Finally, even if a prosecutor does exceed the bounds of permissible argument, reversal is required "only 'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Pickett v. State,* 222 Md. App. 322, 330 (2015) (quoting *Spain v. State,* 386 Md. 145, 158 (2005)). "'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.'" *State v. Newton,* 230 Md. App. 241, 255 (2016) (quoting *Spain,* 386 Md. at 159); *see also Mitchell,* 408 Md. at 392-93 (applying a similar analysis to a burden-shifting argument).

Against that backdrop, we hold that the trial court did not err in permitting the State to comment on Mr. Pineda's ability to call certain witnesses. During his closing argument, defense counsel repeatedly highlighted the fact that the State could have called, but failed to call, various witnesses, including other family members who lived with E. and Mr. Pineda during the times that E. claimed the incidents of abuse had occurred. In so doing, defense counsel insinuated that those witnesses possessed pertinent information and that the State had chosen not to call those witnesses because their testimony would have supported Mr. Pineda's claim that the abuse never occurred. Given those comments, the prosecutor had the right to address the witnesses' absences, which the prosecutor did by explaining during rebuttal argument that the State did not call those witnesses because they were not present when the abuse occurred. The State then noted that, if defense counsel truly believed that those witnesses' testimonies were relevant, then the defense had the

opportunity to call them as well. That comment was a proper response to defense counsel's argument and did not shift the burden of proof. *Mitchell,* 408 Md. at 387-89.

Mr. Pineda argues that it would be "unreasonable" for this Court to say that he "opened the door" to the issue of the missing witnesses because the issue was actually first raised by the prosecutor in the State's initial closing argument. Mr. Pineda maintains that defense counsel was responding to the following argument by the prosecutor, in which the prosecutor discussed Mr. Pineda's telephone calls to E.'s mother on the day that E. disclosed the abuse:

> [Mr. Pineda] then was asked in great detail about what happened the day after [E.] told her mom that the defendant had been sexually abusing her. He said that when [E.] and her mom were out at the doctor's, he wasn't home. He was out with [E.'s sister] and his two children, dropping off something.
>
> * * *
>
> Now, why doesn't that make sense? He just said they came from being out. So why did he need to leave to feed her kids, when they just came back from being out with your kids. Why did he say that? Well, he had to say that. He had to make up a story that would explain him not being at the house because if he came up with something to explain him not being at the house, he wouldn't have been there when [E.'s brother] spoke to [E.'s mother].
>
> When [E.'s brother] found out what [E.] had told [her mother] what the defendant did, [E.'s brother] left the house and went to be with [E. and her mother]. He couldn't have you know that he was actually home because it makes these calls look real suspicious. Doesn't it?

Mr. Pineda argues that the prosecutor, in making the above comments, was articulating a "complicated theory to cast the calls as 'real suspicious.'" He asserts that defense counsel's subsequent discussion of the missing witnesses was responsive to the prosecutor's argument. He maintains that, because the prosecutor, and not defense counsel,

"opened the door" to the issue of the missing witnesses, defense counsel's argument did not justify the State's rebuttal argument.

We remain unpersuaded. To begin with, we fail to see the connection between the State's initial argument and defense counsel's repeated arguments regarding the State's failure to call various witnesses. Although the prosecutor did suggest that Mr. Pineda's calls to E.'s mother were suspicious, at no point did the prosecutor suggest that any of the other family members possessed relevant testimony on that issue. Thus, there was no need for defense counsel to respond by highlighting the State's failure to call those family members as witnesses.

Moreover, even if some of defense counsel's comments could be construed as being responsive to the prosecutor's perceived insinuation regarding Mr. Pineda's telephone calls, it is clear that defense counsel's repeated comments were intended to suggest that the missing witnesses had relevant knowledge, not just about the phone calls, but about the incidents of abuse in general. Assuming the prosecutor "opened the door" to the issue of the missing witnesses with respect to the phone calls, defense counsel subsequently "opened the door" to a different issue, namely, the implication that the missing witnesses had more general knowledge about the abuse and yet were not called by the State. The prosecutor was within the bounds of acceptable argument in responding to that implication.

Assuming, *arguendo*, that the prosecutor's comment was improper, reversal would be unwarranted. The comment was isolated and was not repeated. After defense counsel objected, the trial court reminded the jury that the prosecutor's comment was "argument." During opening and closing arguments, defense counsel emphasized that the State had the

burden of proving Mr. Pineda's guilt. And, just prior to closing arguments, the court instructed the jury that argument by counsel was not evidence and that the State had the burden of proving all elements beyond a reasonable doubt. Given those circumstances, we cannot say that the prosecutor's comment misled the jury or was likely to have influenced the jury to the prejudice of the Mr. Pineda. *See Mitchell,* 408 Md. at 392-93.

II.

Mr. Pineda's next claim of error concerns testimony given by E. and E.'s mother regarding an incident involving Mr. Pineda and E. that was not charged in the indictment. As noted, Mr. Pineda was charged with sexually abusing E. between March 2013 and March 2016. At trial, during E.'s direct testimony, the State asked about an incident that had occurred in 2019, several years after the alleged abuse occurred. After defense counsel objected on relevancy and prejudice grounds, the State proffered that the testimony was relevant because it provided context for when E. finally disclosed the abuse. The court overruled the objection.

E. thereafter testified that, when she was approximately 12 years old, she and Mr. Pineda were making a t-shirt for a school project, and Mr. Pineda touched her thigh. E. testified that, when Mr. Pineda touched her thigh, she "smacked his hand" and "yelled at him." E. stated that that was the first time that she had reacted in such a way upon being touched inappropriately by Mr. Pineda. E. testified that, sometime thereafter, she told her mother about the t-shirt incident. Soon thereafter, E. told her mother about all the other incidents of abuse.

Later, during E.'s mother's direct testimony, the State asked about the t-shirt incident in which Mr. Pineda touched E.'s thigh. After defense counsel objected, the court overruled the objection, finding that the testimony was relevant to explain the delay in E.'s disclosure of the prior incidents of abuse. E.'s mother thereafter testified that, a few months prior to E.'s disclosure of the various incidents of abuse, E. had told her about the incident in which Mr. Pineda had touched E.'s thigh.

Mr. Pineda now claims that the trial court erred in permitting E. and her mother to testify about the t-shirt incident. He argues that the testimony was irrelevant to the jury's resolution of whether he had abused E. between March 2013 and March 2016. He argues further that the testimony was unduly prejudicial because its effect was to substantiate E.'s testimony on an immaterial point and to correspondingly discredit his testimony on the primary issue of whether he had abused E.

The State argues that the testimony was relevant and that its probative value was not outweighed by the danger of unfair prejudice. The State argues, in the alternative, that any error in admitting the evidence was harmless.

Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Evidence that is relevant is generally admissible; evidence that is not relevant is not admissible. Md. Rule 5-402. Establishing relevancy "is a very low bar to meet." *Williams v. State,* 457 Md. 551, 564 (2018). We review the court's determination of relevancy under a *de novo* standard. *State v. Simms,* 420 Md. 705, 725 (2011).

Even if legally relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the [fact-finder's] evaluation of the issues in the case." *Smith v. State,* 218 Md. App. 689, 705 (2014). In so doing, "[w]hat must be balanced against 'probative value' is not 'prejudice' but, as expressly stated by [Md.] Rule 5-403, only 'unfair prejudice.'" *Newman v. State,* 236 Md. App. 533, 549 (2018). Moreover, "the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in [Md.] Rule 5-403." *Ford v. State,* 462 Md. 3, 58-59 (2018) (quotation marks and citation omitted). "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State,* 152 Md. App. 305, 324 (2003).

We hold that the testimony regarding the t-shirt incident was relevant and not unduly prejudicial. To be sure, the occurrence of the t-shirt incident in 2019 did not make it more or less likely that Mr. Pineda abused E. between March 2013 and March 2016. That does not mean, however, that the incident was irrelevant. *See Wise,* 132 Md. App. at 137 (defining inadmissible, collateral facts as those that "'are *incapable* of affording *any* reasonable presumption or inference as to the principal fact or matter in dispute"' (emphasis added) (quoting *Dorsey v. State*, 276 Md. 638, 643 (1976))). One of the primary issues for the State at trial was establishing that the abuse occurred within the time period

alleged in the indictment. That showing was almost entirely contingent upon E.'s testimony, which not only provided the jury with a first-hand account of the abuse but also established a relevant narrative for when the abuse began, when it ended, and when it was finally disclosed. E.'s account of the t-shirt incident was relevant in setting forth that narrative.

Moreover, given that the abuse purportedly ended in 2016 but was not disclosed until 2019, the jury likely had questions regarding why E. decided to disclose the abuse in 2019, when she was 12 years old, and not any earlier. As E. explained, the t-shirt incident represented the first time that she had expressed overt and unambiguous dissatisfaction with Mr. Pineda's inappropriate touching. It was also the first time that E. disclosed such a touching to her mother. From that, a reasonable inference could be drawn that, at the time of the t-shirt incident, E. had developed the necessary maturity and awareness to recognize the inappropriateness of Mr. Pineda's touching and to disclose that behavior to her mother. The t-shirt incident was therefore relevant in dispelling any reservations the jury may have had regarding the delay in E.'s disclosure of the abuse.

Regarding prejudice, we hold that the trial court did not abuse its discretion in admitting the evidence. As noted, testimony regarding the t-shirt incident was significant in establishing the timeline of events and in providing the jury with a framework for when the abuse occurred and when it was ultimately disclosed. There is nothing in the record to suggest that the State relied on that evidence for any other purpose, nor is there anything to suggest that the admission of the evidence caused undue prejudice.

Mr. Pineda argues that the evidence was prejudicial because, when he testified, he claimed that the t-shirt incident never occurred, which contradicted both E.'s testimony and E.'s mother's testimony. He asserts that the effect of E.'s mother's testimony, which corroborated E.'s testimony regarding the incident, "was to substantiate the witness on an immaterial point and to correspondingly discredit [Mr. Pineda] as to his credibility on the main issue." (Cleaned up.)

We remain unpersuaded. First, we disagree that the disputed testimony was "an immaterial point." As discussed, the testimony was probative of several material issues. Nevertheless, any effect that the disputed testimony had on Mr. Pineda's credibility was a direct result of Mr. Pineda taking the stand and denying that the incident occurred. The jury was well-within its right in assessing Mr. Pineda's credibility on that issue. Thus, we cannot say that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

III.

Mr. Pineda's final claim is that the evidence adduced at trial was insufficient to sustain his convictions of second and third-degree sexual offense. He argues that for each of those convictions the State was required to show that the offense was committed within the time period set forth in the indictment, *i.e.*, between March 2013 and March 2016. He asserts that the State failed to meet that burden. For the two convictions of second-degree sexual offense, which he claims were based on the two incidents of digital penetration at the pool and at the mall, Mr. Pineda contends that the State failed to present any evidence as to when those incidents occurred. For the conviction of third-degree sexual offense,

which he claims was based on the incident during which he touched E.'s breast, Mr. Pineda claims that E. testified that the incident occurred after March 2016. Mr. Pineda argues that, because there was a "variance" between the charging document and the evidence, the evidence was insufficient to sustain his convictions. Mr. Pineda also argues that the trial court, in denying his motion for judgment of acquittal, made several factual findings that were clearly erroneous.

The State argues that the evidence was sufficient.[1] The State notes that both this Court and the Court of Appeals have held that the time period during which sexual abuse occurred, as established by the evidence, need not coincide with the time period charged in the indictment, provided that the evidence demonstrates that the abuse was committed prior to the return of the indictment and within the statute of limitations. The State argues that the evidence presented in the instant case met that standard.

"The standard for appellate review of evidentiary sufficiency is 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." *Scriber v. State,* 236 Md. App. 332, 344 (2018) (quotation marks and citation omitted). "When making this determination, the appellate court is not required to determine 'whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Roes*

[1] The State argues, preliminarily, that Mr. Pineda's sufficiency claim was unpreserved as to the two counts of second-degree sexual offense because the grounds he raises on appeal were not raised at trial. We disagree. The record makes plain that Mr. Pineda moved for judgment of acquittal on all counts based on the argument that the State had failed to establish that the abuse occurred during the requisite time period. Thus, that argument was preserved.

v. State, 236 Md. App. 569, 583 (2018) (quoting *State v. Manion,* 442 Md. 419, 431 (2015)). "This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *Scriber,* 236 Md. App. at 344 (quotation marks and citation omitted). "Thus, the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Id.* (quotation marks and citation omitted).

To prove second-degree sexual offense, the State needed to show that Mr. Pineda committed a "sexual act," which is defined to include digital penetration of the vagina, when E. was under the age of 14 years and Mr. Pineda was at least four years older. *E.g.,* Md. Code, Crim. Law § 3-306[2]; Md. Code, Crim. Law § 3-301(d). To prove third-degree sexual offense, the State needed to show that Mr. Pineda engaged in "sexual contact," which is defined to include touching of the victim's "intimate area for sexual arousal or gratification, or for the abuse of either party[,]" when E. was under the age of 14 years and Mr. Pineda was at least four years older. *E.g.,* Md. Code, Crim. Law § 3-307; Md. Code, Crim. Law § 3-301(e).

In the indictment, the State alleged that the incidents of second and third-degree sexual offense occurred between March 2013 and March 2016. As the State correctly notes, however, our courts have made clear "that, because the date of an offense generally is not an element of the offense, a variance between the time period alleged in the

[2] Repealed by Acts 2017, c.161, § 1 (eff. October 1, 2017).

indictment and the proof at trial is not fatal to a conviction." *Reece v. State,* 220 Md. App. 309, 333 (2014). In other words, '"the time period proven need not coincide with the dates alleged in the charging document, so long as the evidence demonstrates that the offense was committed prior to the return of the indictment and within the period of limitations."' *Id.* at 333 (quoting *Crispino v. State,* 417 Md. 31, 51-52 (2010)).[3] With respect to sexual abuse cases involving young victims, the Court of Appeals has emphasized that requiring specificity in dates would be unreasonable because "[t]he ability of a child to definitely state the date or dates of the offenses or to narrow the time frame of such occurrences may be seriously hampered by a lack of memory." *Crispino*, 417 Md. at 53 (quotation marks and citation omitted).

Consequently, and despite Mr. Pineda's claims otherwise, the State did not need to prove that the incidents that formed the basis of the offenses at issue occurred between March 2013 and March 2016. Rather, the State merely needed to show that the incidents occurred before the return of the indictment, within the period of limitations, and at a time when E. was under 14 years of age and Mr. Pineda was at least four years older.

E.'s testimony, when considered in conjunction with her mother's testimony, provided such evidence. E., who was born in March 2007, testified that the first incident

[3] Mr. Pineda claims that *Crispino* and *Reece* are factually distinguishable, and thus inapposite, because, in those cases, the evidence established a concrete time frame when the abuse occurred, whereas, in the instant case, "the State utterly failed to provide a reference to any time frame." He is mistaken. There is nothing in the language of either case to indicate that the case's core holding would be inapplicable under the facts presented here. Moreover, as discussed, the evidence presented by the State in the instant case did establish a time frame for when the abuse occurred.

of abuse occurred when she was in first grade and that all of the incidents of abuse, including those that formed the basis for the convictions at issue, occurred prior to her entering sixth grade. E.'s mother testified that E. attended the second grade when she was six years old and that she attended the fifth grade when she was nine years old. From that, a reasonable inference could be drawn that the abuse began in late 2012 (when E. was six years old and entering the first grade) and ended in late 2017 (when E. was ten years old and entering the sixth grade). At the very least, a reasonable inference could have been drawn that the abuse occurred no later than November 2019, which is when E. disclosed the sexual abuse to her mother. A reasonable inference could therefore be drawn that each incident occurred at a time when E. was under 14 years of age and Mr. Pineda, who was born in 1991, was at least four years older. For the same reason, a reasonable inference could be drawn that each incident occurred prior to the return of the indictment, which was filed in March 2020. Finally, because second and third-degree sexual offense are both felonies without any expressed statute of limitations, there was no limitation period. *Greco v. State*, 65 Md. App. 56, 63-64 (1985); *see, e.g.,* Md. Code, Crim. Law §§ 3-306 and 3-307. As such, the evidence adduced at trial was sufficient to sustain Mr. Pineda's convictions, and Mr. Pineda's claim that the State "utterly failed to provide a reference to any time frame" is without merit.

Finally, as to Mr. Pineda's claims that the trial court made clearly erroneous findings in denying his motion for judgment of acquittal, we are unmoved. Appellate review of the legal sufficiency of the evidence is *de novo*. *Purnell v. State,* 250 Md. App. 703, 711, *cert. denied,* 476 Md. 252 (2021). Under that standard, we are unconcerned with what a

factfinder did with the evidence; "[i]nstead, we are concerned with what a factfinder could have done with the evidence." *Id.* (quotation marks and citation omitted). In other words, "legal sufficiency of the evidence is not concerned with the findings of fact based on the evidence or the adequacy of the factfindings to support a verdict. It is concerned only, at an earlier pre-deliberative stage, with the objective sufficiency of the evidence itself to permit the factfinding even to take place." *Chisum v. State,* 227 Md. App. 118, 129-30 (2016). Thus, any "erroneous" findings of fact by the trial court in ruling on Mr. Pineda's motion for judgment of acquittal have no bearing on our assessment of the legal sufficiency of the evidence.

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