Circuit Court for Montgomery County
Case No.: 137430C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1257

September Term, 2022

MICHAEL JOHN GRIFFITH

v.

STATE OF MARYLAND

Graeff,
Reed,
Friedman,

JJ.

Opinion by Reed, J.

Filed: April 15, 2024

*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 sitting in the Circuit Court for Montgomery County convicted Michael John Griffith ("Appellant") of rape and sexual offenses involving his daughter ("S.").[1] Appellant raises two questions on appeal, which we have slightly rephrased for clarity[2]:

I. Did the trial court err when it allowed the State to engage in improper closing argument?

II. Did the trial court err when it allowed the State to ask leading questions of S. during direct examination?

For the reasons that follow, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that Appellant sexually abused his daughter, S., over a seven-year period, starting when she was nine years old with sexual touching that progressed to vaginal intercourse until she was 16 years old. Testifying for the State, among others, was S.; S.'s mother ("Mother"); and S.'s older brother. The defense's theory

[1] Specifically, the jury convicted Appellant of: (1) sexual abuse of a minor; (2) four counts of second-degree rape; (3) three counts of second-degree sexual offense; and (4) two counts of third-degree rape. The court sentenced Appellant to an aggregate sentence of 108 years imprisonment.

[2] In his brief, Appellant presented the following questions:

I. Whether the trial court improperly permitted the State to comment on Griffith's silence and to burden-shift in their closing argument?

II. Whether the trial court abused its discretion by allowing the State to elicit testimony through impermissible leading questions from the victim to meet required elements of the alleged crimes?

was that S. was lying because, among other things, S. was angry that Appellant had taken away her cell phone. The following facts were elicited at Appellant's trial.

Mother, who was 41 years old at the time of trial, testified that she and Appellant began a sexual relationship when she was 14 years old, and he was 36 years old. Their "off again/on again" relationship lasted for about 13 years, ending in 2006. Although they never married, together they had the following four children in descending order by age: an oldest son born in November 1996; a daughter who died; S., born on March 24, 2003; and another son, who was a year younger than S. Mother testified that when she and Appellant ended their relationship, the children lived with her but regularly saw Appellant, although Appellant spent the most time with S. Shortly after marrying her second husband in 2007, she and the children moved to their current residence near Gaithersburg. Around that time, Appellant moved to his current residence, a first-floor bedroom in a house in Gaithersburg owned by an 80-year-old woman, who lived upstairs.

Mother testified that shortly after Christmas 2019, she and her husband were in the living room of their home when S. said she needed to tell them something. S. then said that Appellant was sexually abusing her, "like her older brother had done" to her.[3] Mother testified that S. appeared "very serious" and "shaken" when telling them. S. gave few details about the abuse but later told Mother that the abuse occurred in their home, Appellant's home, and at Appellant's rented storage unit. S. also told Mother that the

[3] When S. was about nine years old, she disclosed to her Mother that her older brother was sexually abusing her. The brother was subsequently arrested and pled guilty to sexually abusing S.

overlap of abuse by Appellant and her older brother resulted in sometimes being abused by each of them separately on the same day.

Mother told S. that they needed to call Child Protective Services, which she did the next day. An interview was scheduled the following week at the Family Crisis Center in Montgomery County with a detective and a social worker. When they arrived, however, the detective and social worker decided it was best not to interview S. that day because she was "hysterical[ly] crying" and "very upset." About a week later, S. told her Mother that she was ready to return to the Crisis Center to be interviewed. A full forensic interview of S. by a social worker occurred on January 13, 2022, which was recorded. The detective interviewed Mother about a week later, after which S. voluntarily turned over her cell phone to the detective.

Mother testified that she had "no idea" that Appellant was sexually abusing S. As far as Mother was aware, S. was "daddy's little girl" – buying S. "everything she wanted," including new watches and iPhones and paying for the service plan. Mother testified that Appellant never paid any attention to his other children but only seemed to care about S. On cross-examination, Mother denied that Appellant had "cut off" S.'s phone service or that there was tension between Appellant and S. over her phone around the time S. disclosed the sexual abuse. Rather, Mother explained that after S. disclosed Appellant's sexual abuse of her, Appellant got mad at S. because she refused to take his phone calls. Mother's husband testified that over the years S. and Appellant would have "little spat[s]" when Appellant threatened to take away her cell phone.

S. testified that she is currently 19 years old and lives with her Mother and her stepfather. She testified that the first time she remembered her father touching her sexually was when she was about nine years old and they were in his car. He instructed her to touch his penis with her hand. After the first sexual touching in the car, the same act occurred in the room he rented and when he visited the home where S. lived with her mother and stepfather. When Appellant instructed her to touch his penis, the touching was both on top of and underneath his clothes.

S. testified that the touching of his penis progressed to him touching and penetrating her vagina with his fingers. When she was around 14 years old, he had her perform fellatio on him, and he licked her vagina. These acts occurred in the room he rented, his car, and the storage unit he rented. He also had her take pictures of her vagina with his cell phone. When she was 15 years old, he put the tip of his penis in her vagina, which progressed to vaginal penetration. S. testified that this happened "[a] lot" and occurred at the room he rented and his storage unit. S. told Appellant repeatedly not to touch her, but he "just laughed" and continued to engage her in sexual activity. She testified that she did not tell anyone what was happening because Appellant told her that if she "said anything … no one would believe me because he's older." The abuse stopped when she told her Mother and stepfather.

On cross-examination, S. acknowledged that Appellant bought her a phone and paid for the service. She denied having a "disagreement" with Appellant about her phone, explaining that after she disclosed the abuse to her Mother, Appellant repeatedly tried to contact her but the police told her not to answer his calls or texts, which made Appellant

mad. She testified that Appellant did not take her phone away, rather the police seized it during their investigation and she got a new phone.

In February 2020, a search warrant was executed for the room Appellant rented. A computer was seized, and pictures were taken of the house where he lived and his bedroom, which were admitted into evidence at trial. Additionally, the police searched two of Appellant's vehicles at the residence. The police found nothing noteworthy in the searches of S.'s telephone or Appellant's computer, storage unit, or cars.

S.'s older brother testified that he was currently incarcerated on pending, unrelated armed robbery charges. He testified that when he was between 7 and 8 years old, Appellant performed oral sex on him and engaged him in anal sex multiple times. He testified that he has not and refuses to press charges against his father with whom he says he has a "good" relationship. He testified he was not promised anything in exchange for his testimony but chose to testify to heal from "the trauma" he experienced by his father's sexual assaults. He had never spoken about the sexual assault Appellant perpetuated on him until 2020, when he called his Mother, with whom he does not have a good relationship, to find out why Appellant was not returning his phone calls. He admitted that when S. was 9 years old, and he was around 16 years old, he sexually abused her. He was subsequently prosecuted and pled guilty to sexually abusing S. He did not know that at the same time he was abusing S., she was being abused by their father.

A defense witness, who was a friend of Appellant and Mother, testified that while at S.'s 16th birthday party, about nine months before her disclosure, he observed S. and Appellant arguing about her phone with S. saying to Appellant, "FU, you're not my father."

Appellant's son from a prior relationship, who is 17 years older than S., testified that he "vaguely" knew of S.'s anger toward Appellant about her cell phone.

DISCUSSION

I.

Appellant argues on appeal that the circuit court erred when it allowed the State to make improper remarks during its closing argument that allegedly commented on his right to remain silent and shifted the State's burden of proof to the defense. The State responds the circuit court did not err because the State's remarks went to the weakness of the defense's case, and because Appellant "opened the door" in his opening statement. Even if the court did err, the State argues that reversal is not required because the remarks did not prejudice Appellant.

We will begin our review by detailing the remarks during the State's closing argument that Appellant alleges were improper. Also, we will review the prior opinions in Maryland that consider improper statements in closing argument on the defendant's right to remain silent and the State's burden of proof. For the reasons detailed *supra*, we conclude that the State's remarks in closing did not improperly comment on the defendant's right to remain silent. As for Appellant's second argument, we affirm the decision of the trial court to allow argument that seemed to shift the burden of proof because it did not rise to the level of reversible error.

Closing argument in this case comprised a total of 65 pages of typed transcript. The State began its closing argument by summarizing the case and the witnesses' testimony. Beginning with S.'s testimony, the State spoke about what she had "lost and what she

gained" through her disclosure. Specifically, in disclosing the abuse, the State argued that S. lost her place as Appellant's favorite child and now she has no relationship with him. The State then said:

> So what does S. have to gain? One second. **The only thing the defense has suggested** -- that there was an argument over a cellphone. We don't even know if that was necessarily true. S. said, no, I still have a phone. I had it until the police took it. So we don't really know what the cellphone argument was. It's absurd to suggest that she made all of this up, and went through all of this, because her father stopped paying her phone bill, or briefly cut off her phone. It's absurd. It's insulting. It's ridiculous. **It's also the only thing that the defense suggested**.
>
> The State has the burden of proving the case, but the defense also has the ability to present evidence, and they have done that. They've called witnesses, they've cross-examined our witnesses, they've admitted an exhibit. **And the only hypothesis of innocence that they've suggested is** that this is all because of something to do with a 16-year-old girl and an argument with her dad over a phone.
>
> [DEFENSE ATTORNEY]: Objection, Your Honor.
>
> THE COURT: Overruled.

(Emphasis added). Appellant argues that the three highlighted remarks above constituted reversible error.

During closing argument, "'counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly . . . on the nature of the evidence and the character of witnesses[.]'" *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005).

Drawing the jury's attention to the failure of the defendant to testify or the defendant's failure to call witnesses and shifting the burden of proof implicates constitutional rights. *Harriston v. State*, 246 Md. App. 367, 372, *cert. denied*, 471 Md. 77 (2020). This is because a defendant is protected from testifying in his defense and has the right to remain silent pursuant to the Fifth Amendment to the United States Constitution, Article 22 of the Maryland Declaration of Rights, and Md. Code Ann., Cts. & Jud. Proc. Art., § 9-107. Therefore, a prosecutor is prohibited from commenting on a defendant's decision to testify at trial or from shifting the burden of proof to the defendant by direct and indirect comments about a defendant's "failure to produce evidence[.]" *Molina v. State*, 244 Md. App. 67, 174 (2019) (quotation marks and citation omitted).

Despite constitutional protections against closing comments on a defendant's right to remain silent or shifting the burden of proof, "a prosecutor may summarize the evidence and comment on its qualitative and quantitative significance." *Smith v. State*, 367 Md. 348, 354 (2001) (citing *Wilhelm*, 272 Md. at 412-13). In assessing the sometimes murky line between the above, we have emphasized that while a prosecutor may not comment "about a defendant's failure to explain by testifying," a prosecutor may comment on deficiencies in the defense presented by the defense. *Wise v. State*, 132 Md. App. 127, 142-143, *cert. denied*, 360 Md. 276 (2000). Thus, there is a critical distinction between criticizing the lack of testimony by the defendant and criticizing the defense(s) presented. *Id*. at 143.

Not every improper remark made by the State during closing argument necessarily mandates reversal. *Degren v. State*, 352 Md. 400, 430 (1999) (citations omitted). Although generally we review closing argument remarks under the abuse of discretion standard, *see*

Beads v. State, 422 Md. 1, 10–11 (2011), our review of a burden-shifting claim is without deference to the circuit court. *Harriston*, 246 Md. App. at 372 (citation omitted). When assessing whether improper remarks during closing argument constituted reversible error, we "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." *Beads*, 422 Md. at 13 (quotation marks and citation omitted).

In *Smith v. State*, 367 Md. 348, the Maryland Supreme Court[4] addressed the distinction between comments about a defendant's failure to testify and the lack of a defense. In that case, the Court held that the prosecution improperly referred to the defendant's decision to exercise his constitutional right to remain silent when it made the following remark to the jury in closing argument: "What explanation has been given to us by the defendant for having the leather goods? Zero, none." *Id*. at 352, 358. The Court explained that it was unable to conclude that the remark was merely addressing 'the lack of evidence to explain [the defendant]'s possession of the [stolen] goods" because to do so "would ignore the prosecutor's explicit reference to the *defendant* and the insinuated duty of the defendant *personally* to offer an explanation for his possession of the property." *Id*. at 359 (emphasis added).

Here, the prosecutor made the following three remarks: 1) "The only thing the defense has suggested . . . [.]"; 2) "It's also the only thing that the defense suggested."; and

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

3) "And the only hypothesis of innocence that they've suggested is . . . [.]" These remarks made no direct or indirect reference to the fact that Appellant did not testify. Therefore, we do not find that the prosecutor improperly commented on Appellant's constitutional right to remain silent.

The remarks instead seem directed to the theory of defense. This in itself is generally not improper, for a prosecutor does not improperly shift the burden of proof by commenting on the lack of evidence supporting a defense theory. Here, however, the prosecutor's use of the word "only" to describe the lack of alternative theories of innocence—while not an attack on the weakness of the theory advanced by the defense—amounts to burden shifting because it (1) implies that Appellant failed to produce evidence even though the burden always rests on the prosecution and (2) that the defense had the burden to prove Appellant's innocence, which it did not.

The State responds that even if the remarks impliedly shifted the burden of proof, the remarks were permissible because defense counsel opened the door with remarks he made in his opening statement.

The Maryland Supreme Court "has long recognized that the 'opened door' doctrine applies to closing arguments." *Mitchell v. State*, 408 Md. 368, 388 n.8 (2009) (finding no error in the State's rebuttal closing argument about the defense's power to issue subpoenas where the defense argued in closing that the State should have called certain witnesses). Comments made in opening statement can also open the door. *Wise*, 132 Md. App. at 146 (prosecutors are permitted to "call[] attention to the failure of defendants to come forward with evidence that they promised to produce in opening statements."). Where the defense

counsel promised in the opening statement that the defendant will produce evidence and thereafter fails to do so, the defense "open[s] the door to the fair comment upon that failure, even to the extent of incidentally drawing attention to the defendant's exercising a constitutional right not to testify." *Id.* at 148.

In *Wise*, the defendant was convicted of offenses related to street level drug dealing, specifically possession with the intent to distribute cocaine and possession of cocaine. *Wise*, 132 Md. App. at 137-38. At trial, defense counsel promised the jury in their opening statement that they would hear testimony about a drug dealers' standard practice of looking out for police cars. *Id*. at 144-45. This was in support of defense counsel's version of events, that the defendant was innocently at the scene and an aggressive police force was baselessly pointing a finger at the defendant for drugs left in the area by another party. *Id*. at 143-44. The defense presented no such evidence to support this theory of events. In closing argument, the State repeatedly asked the jury, "Where is his evidence?"[5] *Id*. at 141.

On appeal, Wise argued that the State had repeatedly and improperly shifted the State's burden of proof. *Id*. at 139. We found no error by the trial court in permitting those remarks, stating, "there can be no doubt that the prosecutor was referring to the failure of the defense attorney, who had made the claim during opening statement that he would

[5] Specifically, over defense counsel's objections, the State remarked in initial closing argument: "My question to you is, where is his evidence for any of the arguments he made?"; "Where is his evidence that the defendant feared for his safety?"; "Where is his evidence that the . . . the police were - . . . aggressive?"; "But where's his support for anything he told you?"'; "Where's the support and any evidence that dealers left the area?"; "Where's his evidence of anything that he told you?" *Id*. at 141-42.

produce certain evidence, to follow through." *Id*. at 143. We reasoned that the State's closing argument was "drawing the jury's attention to the fact that defense counsel had failed to fulfill his prediction in opening statement as to what he would develop at trial." *Id*. at 145. We explained:

> 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. On the other hand, *a defense attorney's promising in opening statement that the defendant will produce evidence* and thereafter failing to do so does open the door to the fair comment upon that failure, even to the extent of incidentally drawing attention to the defendant's exercising a constitutional right not to testify.

Id. at 148 (emphasis added). Under the circumstances presented in *Wise*, we concluded that "the prosecutor's comments here were a reasoned and justified response to the excesses of the defendant's opening statement and as such did not violate the defendant's constitutional rights." *Id.* at 148-49.

Eastman v. State, 47 Md. App. 162, 165 (1980) also provides guidance on this issue. In that case, the defense made the following remarks in its opening statements:

> We expect the evidence to show that [the defendant] was not arrested for these robberies until August of this year. In other words, it was a time lag of 17 months between the time of the robbery and the time that [the defendant] was arrested. For that reason, ladies and gentlemen, we cannot present any evidence as to the content of these crimes. Frankly, my client, when he was arrested in August of this year, could not recall what he was doing on two obscure dates in March of 1978. By the same token, ladies and gentlemen, we will not present an alibi defense, because my client, again simply lacks the knowledge and the ability to recall as to what he was doing 17 months from the day he was arrested.

Id. at 165. During closing argument, the prosecutor remarked as follows:

> I submit that when you take the testimony of those six honest people, and you balance it against what this individual has told you, and there has been

> no testimony, ladies and gentlemen, other than his, I submit to you that counsel in his opening statement to you does not present evidence in the case, and when [defense counsel] told you that [the defendant] did not know where he was, that is what [defense counsel] told you. No evidence has come from the stand on that.

Id. at 166.

On appeal, we agreed with Eastman that generally "there can be no comment on a defendant's failure to testify," but nonetheless held that "when placed in context, the prosecutor did nothing more than point out that [the defendant] had failed to produce evidence of his lack of knowledge, as had been pronounced by counsel's opening statement[.]" *Id.* at 164-65. We held that the prosecutor's comments were not unreasonable under the circumstances, explaining:

> If it is not unreasonable to permit the defense to comment upon the State's shortcomings in producing prosecutorial evidence, we can hardly preclude a reciprocal right for the State "to call attention" to the failure of a defendant to come forward with that which he promised to produce.
>
> Although [the defendant's] failure to take the stand may have been inferable, in light of the context, such inference would have been strained indeed. A more likely inference was available in [the defendant's] opening statement that he would testify to why he had no alibi. There is not the slightest indication that the State was merely grasping for an opportunity to emphasize the failure to testify. To the contrary, the State carefully avoided any emphasis even by implication.

Id. at 167.

Returning to the present case, defense counsel made the following remarks during opening statement:

> **We're going to give you some defenses**, we hope.
>
> * * *

> This young girl who lives with her family, lives with a lot of people, no one ever hears from her about these allegations. **You'll hear possible reasons why that are alternative to the State's reasons. Remember, the Defense doesn't have to prove he's innocent. He's innocent**.
>
> **The Defense can pose it and give to you reasons why certain things are the way they are. We don't know. I'm not a police officer; I can't go out there and do detective work; but we can give you some information, for example, I'll give you one piece right now**. We know, we know that for some reason, and this is really, actually totally amazing to me, that one of the main reasons why all of this is happening is because he was, Mr. Griffith, was taking care of [S.'s] telephone, paying the bill and all that kind of stuff; and then they had a fight about the telephone, about the paying the bills and stuff like that, dad and daughter. And then this all blossomed from there which I know it sounded like, how can that happen; but you'll hear that there's much more involved than that. They, that immediately casts doubt.

(Emphasis added).

Under the opening the door theory, we think that of the prosecutor's closing remarks the first two were short, reasoned, and justified in response to defense counsel's opening statement, and accordingly, did not violate the defendant's constitutional rights. The third remark ("[a]**nd the only hypothesis of innocence that they've suggested is** that this is all because of something to do with a 16-year-old girl and an argument with her dad over a phone."), however, combines both a response to defense counsel's opening statement and an improper shifting of the burden of proof by implying that Appellant must produce evidence of his innocence. *See Molina, supra*. Nonetheless, we do not find the remark reversible because we do not believe that it misled the jury under the circumstances presented. When assessing whether reversible error has occurred by improper remarks during closing argument, we determine whether the remarks misled the jury by considering 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." *Beads*, 422 Md. at 13 (quotation marks and citation omitted).

Here, the evidence primarily came from the 19-year-old victim, who testified as to the assault she endured for seven years at her father's hands. The discomfort she felt while testifying against him was palpable from the typed transcript. There was also evidence that Appellant had a history of sexually preying on young people – he and the victim's mother were 36 and 14 respectively when they began a sexual relationship, and the victim's brother testified that their father (Appellant) raped him when he was 7 or 8 years old, about the same age as the victim. The remarks were made during a total closing argument of 65 typed pages of transcript. Importantly, the remarks came in the State's initial closing argument not rebuttal closing argument, and after making the three remarks, the State moved on to discuss the other witnesses who testified. Moreover, the court properly instructed the jury on the defendant's right to remain silent, the presumption of innocence, the State's burden of proof, and that opening statements and closing arguments are not evidence.[6] Additionally, after the State's closing, defense counsel had the opportunity to

[6] The court also addressed the jury after it was sworn on the first day of trial, stating:

> THE COURT: At this time, I would like to give you an overview of how this case is going to proceed[.] The prosecutor and the defense attorney may choose to make an opening statement. **Opening statements are not evidence**. They're an opportunity for the lawyers to give you an overview of what the case is about and what they expect the evidence will be at trial. After the openings, the evidence portion of the trial begins.
>
> * * *

(continued)

respond to the State's remarks, and it did so vigorously.[7] Specifically, defense counsel repeatedly told the jury that Appellant was innocent and had no burden of proof, stating:

> Following the evidence portion of the case, I will instruct you on the law that applies to the case. You must apply the law as I explain it to you in arriving at your verdict. Following my instructions, the lawyers are permitted to give closing arguments. **These arguments are not evidence**. They're an opportunity for the lawyers to summarize and to comment on the evidence that you have heard and to argue to you how to decide the charges in this case. . . . **The State proceeds first in the trial process because the State has the burden of proving its case against the defendant beyond a reasonable doubt**. . . . **The defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt**. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crimes charged. The elements of a crime are the component parts of the crime about which I will instruct you later. **This burden remains on the State throughout the trial. The defendant is not required to prove his innocence[.]**

(Emphasis added).

[7] Defense counsel also emphasized and mirrored in its opening statement the court's instructions to the jury:

> **[Appellant] doesn't have to do anything. He is not guilty. And if he chooses not to put on a case, he is still not guilty. He doesn't have to say, no, it didn't happen. I'm telling you right now, so, he doesn't have to say that. He doesn't have to get on the witness stand and say, no, it didn't happen. He is not guilty. He doesn't have to do a thing; he doesn't have to do a lick. The State must convince you with their evidence, not their arguments, not their statements, not their [sic] possibly this could have happened. They have to convince you with their evidence that he's guilty beyond a reasonable doubt before you can take away innocence**.
>
> * * *
>
> **The Defense doesn't have to do anything**.

(continued)

> 1) "The State tries to say, well, they didn't give you a good enough reason why it didn't happen. My client does not have to do a thing. He is innocent. He has no burden. And for the State to try to shift the burden to him is wrong. He has no burden. He doesn't have to tell you why maybe he thinks something happened. He doesn't know why."
>
> 2) "He doesn't have to do anything."
>
> 3) "We did our best to try to give you something but it doesn't matter what we gave you. It doesn't shift the burden to us, because we tried to help. We did what we can to present you some evidence as to what we might think maybe she's upset about. But it doesn't matter.
>
> 4) "That's why, when they try to shift the burden, it's completely inappropriate, because it's their burden[.]"
>
> 5) "But there's plenty of – there's plenty of reasons. And just because we give you a reason, that may or may or may not be one that they feel is good enough, doesn't mean that it's not a reason."
>
> 6) "The defendant is presumed to be innocent of the charges. The presumption remains throughout every stage of the trial, even right now, by the way. Right now, he's innocent. Right now. And it's not overcome unless you are all convinced beyond a reasonable doubt that the defendant is guilty. The State must prove beyond a reasonable doubt, beyond a reasonable doubt, each and every element of the crimes charged."

In sum, although the State's remarks go to the defendant's failure to produce any other theory of innocence, this was in response to the defendant's failure to come forward with theories of innocence as suggested in its opening statement. *Cf. Degren v. State*, 352 Md. 400, 429-36 (1999) (holding that prosecutor's comment in rebuttal closing argument

---

> **Why doesn't the Defense have to do anything? Why shouldn't he have to get up and stay [sic], I didn't do it? Because he has a constitutional right not to do anything because it's not up to him. He's not the one making allegations, they are, and it's not just deny allegations**.

that "[N]obody in this country has more reason to lie than a defendant in a criminal trial" did not constitute reversible error because the comment did not bear directly on defendant's guilt or innocence; rather, it was in response to defense counsel's argument in closing that the jury should not believe the State's witnesses because they had various motives to lie; and the court properly instructed the jury on closing argument on the State's burden of proof). The State's evidence was compelling. The court properly instructed the jury that closing argument is not evidence; on the State's burden of proof; and on the presumption of innocence. Lastly, we reiterate that the three remarks were isolated and were made in the midst of long closing arguments that in toto comprised 65 pages of typed transcript. Under the circumstances, we do not believe that the remarks constituted reversible error.

II.

Appellant argues that the circuit court committed reversible error when it allowed the State to impermissibly lead S. during direct examination. He directs us to six instances that he argues constituted impermissible leading. The State responds that the court properly exercised its discretion in allowing the State to lead the witness at times. We agree with the State.

Md. Rule 5-611 governs the circuit court's control over the questioning of witnesses and leading questions. Section (a) provides that the court "shall exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence so as to [] make the interrogation and presentation effective for the ascertainment of the truth, [] avoid needless consumption of time, and [] protect witnesses from harassment or undue embarrassment." Section (c) provides:

> **Leading questions.** The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be allowed (1) on cross-examination or (2) on the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party.

"A leading question generally is a question which suggests to the witness the specific answer desired or a question admitting of being answered by a simple 'yes' or 'no.'" *Johnson v. State*, 9 Md. App. 327, 332 (citations omitted), *cert. denied*, 258 Md. 728 (1970). "The gravamen of a leading question is that it suggests to a witness the specific answer desired by the questioner[.]"6 Lynn McLain, *Maryland Evidence*, § 611.3(a) (2019).

As stated above, the Rule allows for leading questions to "develop the witness's testimony," including situations where "an omission in [] testimony is evidently caused by want of recollection, which a suggestion may assist." *Lee v. Tinges*, 7 Md. 125, 234 (1854) (quotation marks and citations omitted). *See also Wharton's Criminal Evidence* § 8:15 (15th ed. 2023) ("Leading questions on direct examination are permissible . . . when the witness is deficient in memory[.]") (footnote omitted). Additionally, we have stated:

> [L]eading questions are permissible to arrive at facts when modesty or delicacy prevents full answers to general interrogations ..., [i.e.,] ... inquiry into delicate subjects of a sexual nature, constitute an exception to the general rule against leading questions. In such cases, the permitting of leading questions of the prosecutrix, particularly if she is of tender years, is a matter of sound discretion of the trial court.

Nash v. State, 69 Md. App. 681, 688, *cert. denied*, 309 Md. 326 (1987) (approving of State's leading questions of a 13-year-old victim) (quotation marks and citation omitted). *See also Hubbard v. State*, 2 Md. App. 364, 368 (1967) (approving leading questions of a

20-year-old rape victim), *cert. denied*, 393 U.S. 889 (1968) and *Culver v. State*, 1 Md. App. 406, 412 (1967) (approving State's leading questions of a 16-year-old rape victim). Leading questions on direct examination are also permissible "when the witness is hesitant, evasive, reluctant, adverse, or hostile[.]" *Wharton's Criminal Evidence* § 8:15 (footnote omitted).

"The legitimate need for [leading] questions must be balanced against the danger they will supply the witness with a false memory" and the trial court's discretion in allowing leading questions will not be overturned on appeal, unless "there has been such an abuse of his discretion as to prejudice the rights of the accused to a fair trial." *Nash*, 69 Md. App. at 688 (quotation marks and citation omitted).

The first question to which Appellant directs our attention was not leading. At trial, S. testified that the first time Appellant sexually touched her was by making her touch "[h]is dick" with "[m]y hand." The State then asked: "And would he have you touch his penis under his clothes or – " but defense counsel objected before the State could finish on grounds that the State was leading the witness. The court overruled the question. While the question asked S. to choose between two options, the question did not suggest which option to pick and could not be answered with a "yes" or "no."

The preserved, remaining series of questions to which Appellant directs our attention includes the following examination, which we have highlighted:

[THE STATE]: Did he ever touch you sexually anywhere on your body?

[WITNESS]: Yes.

[THE STATE]: Where on your body did he touch you?

[WITNESS]: He touched me on my girl part.

[THE STATE]: Okay. When you say girl part, do you mean your vagina?

[WITNESS]: Yes, sir.

[THE STATE]: It's okay. I know this is real hard to talk about. If you need water or if you need to take a break, let me know. Okay?

When he touched you on your girl part, what did he touch you with?

[WITNESS]: His hand. Sometimes he would lick me down there. Sometimes he would touch me with his dick down there.

[THE STATE]: Okay, now we just got to go through each of these. Okay? When he would touch you with his hand, how many times did that happen?

[WITNESS]: That happened mainly when we were in the car. He would like touch me while he was driving.

[THE STATE]: Okay. Did he touch your vagina also when you were at his house?

[WITNESS]: Yes.

[THE STATE]: Including the one on White Farm.

[WITNESS]: Yes.

[THE STATE]: Okay, did that happen – so did he touch you on the inside, or on the outside, or both?

[WITNESS]: Both. He got the tip in, the inside, and then he stopped because it was hurting.

[THE STATE]: Okay. Going back on – so right now, just to be clear, I'm talking about when he was touching you with his hands.

[WITNESS]: Yes.

[THE STATE]: So when he touched you with his hands --

[WITNESS]: He could only be able to get one finger in.

[THE STATE]: Okay. When he would put a finger – we have to ask these questions just to make sure I'm getting through them correctly.

[WITNESS]: Okay.

[THE STATE]: When he would touch you, would he sometimes just touch the outside of your --

[WITNESS]: Yes.

[THE STATE]: And did that happen under the clothes, or over the clothes?

[WITNESS]: Under.

[THE STATE]: So that was also skin to skin?

[WITNESS]: Yes.

[THE STATE]: And did that happen at the house in --

[DEFENSE COUNSEL]: Your Honor. I'm going again going to object to the leading nature of these questions.

THE COURT: Overruled.

[THE STATE]: And did that also happen at the house on White Farm?

[WITNESS]: Yes, sir.

[THE STATE]: Okay. Were there times when his hand also went inside your vagina?

[WITNESS]: Yes, sir.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: When – where did that happen?

[THE WITNESS]: At White Farm and in, and in his car.

[THE STATE]: And how many times did that happen?

[THE WITNESS]: Multiple, many.

[THE STATE]: So between the ages of 9 and 13, when you were between the ages of 9 and 13 –

[DEFENSE COUNSEL]: Your Honor, I have to object.

A bench conference ensued during which defense counsel advised the court that although it understood "why the Court overruled my objection before," the State was now getting into the elements of the crime. The State responded that it was not trying to suggest the answers to S. but was trying "to ask her about specific things, specific places, and specific times." The court replied that it was not concerned by the questions asked until the last question. The court then warned the State not to "get into" the elements of any crimes when asking its questions and urged the State to ask more open-ended questions when asking the victim about her age. When the State resumed its questioning, it did just that. In fact, defense counsel did not object to the State's questioning on grounds that it was leading at any time thereafter.[8]

We are hard-pressed to see how the court abused its discretion in the above quoted instances. We agree with the State that there can be no more delicate a subject than a daughter's in-court testimony about being repeatedly sexually assaulted and raped by her father over the course of her prepubescent and teenage years. Under the circumstances of this case, particularly where the State could not ask general questions, such as, "What

[8] Because Appellant did not object to the remaining passages to which he directs our attention, he has not preserved argument for our review as to those passages. *See* Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.") and Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

happened on a particular day?" because no specific date for these alleged incidents were known, we find no abuse of discretion. The court properly allowed the State to ask leading questions to focus S.'s attention about particular occasions of sexual abuse and to refresh her recollection about when and where the crimes occurred. The questioning of S. by both parties was extensive, covering about 64 pages of typed transcript, of which Appellant objected only to the leading questions above. The court was in the best position to determine whether leading questions helped refresh her recollection or whether there was any danger that it would supply her with a false memory. We do not believe that the court abused its discretion in striking the balance.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.