Circuit Court for Montgomery County
Case No. 136619C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1836

September Term, 2022

BOBBY IRBY

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 27, 2023

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

A jury sitting in the Circuit Court for Montgomery County convicted appellant, Bobby Irby, of sexual abuse of a minor, two counts of second-degree sex offense, and five counts of third-degree sex offense. The trial court sentenced Irby to a total of 25 years in prison, after which he filed a timely notice of appeal.

Irby asks us to consider the following questions, which we rephrase slightly:

1. Did the trial court err in permitting the State to make an improper argument regarding the testimonies of T.C., Sh. E.-T., and S. E.-T., Irby's second-degree assault conviction, and Irby's apology to the children?

2. Did the trial court err in permitting the State to argue an alternative reasonable doubt standard to the jury?

For the reasons that follow, we find no error on the part of the trial court and affirm that court's judgments.

FACTS AND LEGAL PROCEEDINGS

Irby was charged with sexually abusing T.J. from approximately 2006 through 2012, beginning when T.J. was eight years old.

T.J. testified that on many weekends and during summer breaks from school, she spent time at the homes of her aunts S. and J., together with her six cousins, including S.'s daughters, Sh. E.-T. and S. E.-T.[1] Irby did not live with his daughter S., but he had a room in her basement, and he "probably pretty often" watched the children while S. was at work.

On numerous occasions during a period spanning approximately two years, T.J. said, Irby would seat her on his lap, rub her legs and touch her vagina under her dress, and

[1] S. and J. are T.J.'s father's maternal half-sisters. Irby is S. and J.'s father but is not T.J.'s grandfather by blood, although T.J. considered him to be "a grandfather figure[.]"

then move her around while gyrating his hips. When T.J. reached the age of 10, Irby started taking her into the basement of S.'s house. On one occasion, he asked her for a hug and instructed her to wrap her arms and legs around him, after which he began grinding against her pelvis. On at least two other occasions in the basement, Irby instructed T.J. to open her mouth and then inserted his penis into her mouth. By the summer T.J. was approximately 12 years old, Irby would greet her with a hug, trying to pick her up by cupping her buttocks.

At the time, T.J. did not tell her aunt S. or her mother what Irby was doing because S. was not often home and she did not want to "dump" that information on her mother because "there was other stuff" going on with her. T.J. was also afraid that if she told, her mother would no longer permit her to spend time with her beloved cousins.

In May 2011, T.C., a friend of T.J.'s cousins', revealed that Irby had sexually abused her during a visit to S.'s house.[2] After T.C.'s revelation, T.J.'s mother and aunt J. asked if Irby had ever done anything to her, and she answered that he played with her and touched and hugged her weirdly; she did not mention anything that happened in S.'s basement because she knew that her cousin Sh. E.-T. had disclosed something about Irby's untoward behavior, and the family had called her a liar.

In approximately 2019, T.J. told her mother and Sh. E.-T. about Irby's actions because she "had reached a breaking point" after seeing a photo of Irby holding a baby—another of his grandchildren—in what she deemed an inappropriate manner. Thereafter, T.J. spoke to the police.

[2] As discussed in more detail, below, Irby pleaded guilty to a charge of second-degree assault relating to T.C.

Pursuant to a pre-trial ruling on the State's motion to admit evidence of Irby's other sexually assaultive behavior, the trial court permitted T.C., Sh. E.-T., and S. E.-T. to testify about their experiences with Irby. They did so, as follows.

T.C. explained that she was a family friend who had lived in S.'s home for a short time. When T.C. was approximately 11 years old, Irby occasionally would babysit her and the cousins, playing "games" with them, where he would tickle the girls or lift them up by cupping them around their buttocks so they could "jump" higher than him; during the tickling game, T.C. said, Irby reached his hands between her legs and fondled her vagina. Once, when she slept over at J.'s house, T.C. awoke to find Irby on top of her, "dry humping" her and telling her how to move so he could pleasure himself. On another occasion, when she was about 14 years old, T.C. went to J.'s house to retrieve a set of keys, and Irby pushed her against a wall and caressed her body.

T.C. did not tell anyone at the time because she did not want her mother, a single parent who needed help with childcare, to lose the trusted babysitting J. and S. provided. T.C. also did not want to lose the sisterhood she had developed with Irby's granddaughters.

In May 2011, when she was 15 years old, T.C. went to S.'s house to style Sh. E.-T.'s hair. Irby pushed T.C. against the refrigerator, caressed her breasts, hips, and buttocks, and whispered vulgar sexual innuendo in her ear.[3] Then, with his granddaughter in the room washing her hair in the kitchen sink, Irby put his hands between T.C.'s legs and rubbed her vagina and buttocks.

[3] Irby later testified that he "fell against the refrigerator playing with [T.C.]" .

At that point, T.C. disclosed to her godmother what Irby had done to her, and the police became involved. T.C. said she was unaware of T.J.'s accusations against Irby until she received a subpoena in this case.

Sh. E.-T. testified that Irby, her grandfather, watched the grandchildren on many occasions when her mother S. was at work. Beginning when Sh. E.-T. was seven or eight years old, Irby began "rubb[ing] on" her body and moving her around his groin while she sat on his lap. She also saw Irby do the "lap thing" with her sisters and said it happened "a lot."

When she was in fourth grade, Sh. E.-T. fell asleep in the basement, and when she awoke, Irby was on top of her, with his penis inside her. Another time, Irby watched Sh. E.-T. as she took a shower, and as she tried to go past him into her room, he pushed her down and put his fingers inside her. Sh. E.-T. did not tell her mother because she didn't think her mother, who already believed her to be a liar, would believe her.

S. E.-T. disclosed incidents of Irby placing the grandchildren on his lap and "frequently" touching her on her breasts and hips in ways that made her uncomfortable. S. E.-T. did not tell anyone because she was afraid to say anything.

When the police became involved following T.C.'s disclosure of sexual abuse in 2011, they interviewed Sh. E.-T. and S. E.-T. Neither sister mentioned T.J., and the police did not interview T.J. at that time.

Irby elected to testify, initially denying having visited or babysat his grandchildren between 2006 and 2009, although he later agreed that he watched the grandchildren "off and on" during that time frame. He acknowledged playing with his grandchildren at his

daughter S.'s house but denied sexually abusing any of them, including T.J. Irby implied that their accusations stemmed from Sh. E.-T.'s anger at him for not permitting her to bring boys into the house.

When Irby further denied having touched T.C. inappropriately, the State introduced as impeachment evidence the transcript of his 2011 plea bargain hearing, in which he had pleaded guilty to second-degree assault after admitting to touching T.C. when she had told him to stop, along with the certified copy of the conviction. There was no objection to the admission of that impeachment evidence.[4] Irby responded that he pleaded guilty to "tickling," not touching T.C. to violate her, and offered that the children said "all that stuff about [him]" in 2011 because they were rebelling teenagers.

Also as impeachment evidence, the State played for the jury a portion of Irby's recorded interview by the police following the 2011 incident with T.C. Therein, Irby stated, "Okay. [T.C.], [Sh. E.-T.], . . . [S. E.-T.] this is grandpa. And [another grandchild], I love you all, you know I love you, and I'm sorry for that (unintelligible) and I will never tickle you like that again."[5] Irby explained to the jury that his apology was in response to the detective asking if he wanted to "apologize for playing with the kids."

The jury convicted Irby of all the charged crimes.

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[4] Defense counsel did object to the admission of the transcript, but the objection was limited to the ground of "I don't know which portion" of the transcript was being offered into evidence.

[5] From the prosecutor's clarification immediately after the playing of the recording of the interview, it appears that the portion of the statement that was unintelligible to the court reporter was, "I'm sorry for the way I played with you."

DISCUSSION

I. Closing Argument Relating to Evidence

Irby contends that the trial court erred in permitting the State, in closing argument, to make improper statements regarding: (1) the testimony of Irby's other accusers, T.C., Sh. E.-T., and S. E.-T.; (2) his 2011 second-degree assault conviction; and (3) his apology to his grandchildren. We will discuss each assertion in turn, keeping in mind that the exercise of the trial court's broad discretion to regulate closing argument will not be overturned "'unless there is a clear abuse of discretion that likely injured a party.'" *Anderson v. State*, 227 Md. App. 584, 590 (2016) (quoting *Ingram v. State,* 427 Md. 717, 726 (2012)).[6]

A. State's Closing Arguments Relating to the Testimony of T.C., Sh. E.-T., and S. E.-T.

Prior to trial, the State notified the court of its intent to introduce evidence of Irby's sexually assaultive behavior toward other victims, pursuant to Md. Code, § 10-923 of the

[6] The State avers, preliminarily, that Irby did not preserve this argument for appellate review, by failing to object to every instance of the purportedly objectionable closing argument. We assume, without deciding, that the issue was preserved, but even if it were not, Maryland Rule 8-131 grants us the discretion to consider an unpreserved issue. *See Elliott v. State*, 417 Md. 413, 435 (2010).

Courts & Judicial Proceedings Article ("CJP"),[7] and/or Md. Rule 5-404(b),[8] through the testimony of T.C., Sh. E.-T., and S. E.-T., and the admission of Irby's 2011 guilty plea and conviction relating to his assault upon T.C. Following a hearing, the motions court ruled that the evidence would not be admissible as propensity evidence under Rule 5-404 "when it comes to mistake, or things like that," but that T.C.'s and Sh. E.-T.'s testimony could be admitted into evidence under CJP § 10-923 as to whether or not T.J. had fabricated the sexual offense.[9] As detailed above, T.C., Sh. E.-T., and S. E.-T. did testify about Irby's

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[7] Under CJP § 10-923(e)(1), a "court may admit evidence of sexually assaultive behavior" that occurred before or after the charged crime to help establish credibility in sexual assault cases if the following four factors are met:

> (1) The evidence is being offered to:
> (i) Prove lack of consent; or
> (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;
> (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;
> (3) The sexually assaultive behavior was proven by clear and convincing evidence; and
> (4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

"Sexually assaultive behavior" includes "[s]exual abuse of a minor," which is defined as an "act that involves sexual molestation or exploitation of a minor[.]" Md. Code, § 3-602(a)(4)(i) of the Criminal Law Article ("CR").

[8] Rule 5-404(b) bars, absent an applicable exception, the introduction of "[e]vidence of other crimes, wrongs, or other acts . . . to prove the character of a person in order to show action in the conformity therewith[,]" otherwise known as "propensity evidence."

[9] The motions court left it to the trial court to determine whether S. E.-T.'s testimony would also be admissible pursuant to CJP § 10-923. During trial, the court ruled that S. E.-T. would be permitted to testify about Irby's sexually assaultive behavior toward her. .

sexual abuse of them during approximately the same time period as T.J. was alleging similar abuse.

Prior to closing argument, the trial court instructed the jury, in accordance with the limitations of CJP § 10-923:

> You have heard evidence that the defendant committed other crimes or bad acts which are not charged in this case. You may consider this evidence only to rebut an express or implied allegation that [T.J.] fabricated the sexual offense.
>
> However, you may not consider this evidence for any other purpose. Specifically you may not consider it as evidence that the defendant is of bad character, or has a tendency to commit crime.

The prosecutor then proceeded to closing, arguing, in pertinent part:

> It is the State's burden to prove to you beyond a reasonable doubt each and every element of the crimes that are charged. And it is through that evidence that we as the State embrace that burden, and that's why you heard not just from [T.J.] but all of the other victims in this case.
>
> * * *
>
> As long as all 12 of you agree that he did any of these acts that constitute sexual abuse, he is guilty of sex abuse of a minor. It's a different charge than the rest of them, where it's very specific to the act that is charged. That is, that constitutes all of the defendant's actions.
>
> And that includes what we like to call, what we call sexual exploitation. That includes using the minor [T.J.] for his own benefit.
>
> That includes, and it says, sexual abuse is a wide range of conduct. It's not just what fits in the box of sexual offenses. It's more than that.
>
> It fits all of these, it fits everything that [T.J.] testified to, and you don't have to find that he did it for the purpose of sexual gratification. That's what it actually says in the jury instruction, in and of itself, that it does not require that the defendant commit the act for the purpose of sexual arousal or gratification.

I would submit to you that that's what it's for, but you don't have to actually find that in terms of finding him guilty of sexual abuse of a minor. I would submit to you, if you listened to the testimony, I think it's clear and it's a very logical inference. His penis was erect as he was doing, as he was grinding these girls over his lap, as he was dry humping them.

And of course the fellatio I think speaks in and of itself. But also grabbing the buttocks of these children while he would pull them into his— and in the act, and they would feel his penis against them. I would argue that each and every one of those acts were for the purpose of sexual gratification. But again, you don't have to actually meet that (unintelligible) in terms of your verdict in this case.

Now when looking at the testimony of [T.J.], she showed you who she was. That was her. She wasn't trying to hold back. She wasn't trying to put on a face. She came before you and laid it out, the good, the bad.

She admitted the things that, I didn't say everything in 2011. And she was very up front about all of those things. She was very up front about what was going on in the home, that she liked to go over to see her cousins. Why would you want to go over there if this guy is abusing you? Why would you do that? And she explained that to you. She told you about how she wanted, she wanted to be there. She wanted to be with her cousins.

And that's something that you saw in all the girls, actually, is that they all wanted to be together, despite what the defendant was doing. And this is the thought process of a child. Now this is a teenager we're talking about, that we saw [T.J.] today, but we're really talking about her over a decade ago. That's who was being abused by the defendant.

But she was able to go through and describe to you, and it was a process, the defendant had a process. And how do we know he had a process? Because he used that same process with each and every one of the girls that you heard from, from all four of them.

[DEFENSE COUNSEL]: Objection.

THE COURT: Basis?

[DEFENSE COUNSEL]: I believe it's an improper argument.

THE COURT: I'm sorry?

[DEFENSE COUNSEL]: I believe it's improper, based on the jury instructions.

THE COURT: Overruled.

[PROSECUTOR]: **How do you know that she's not making this up? How do you know that this isn't just, she's just making something up? Because you heard the similarities.**

You heard that he would start, that everything started in the living room, that he would grind, he'd take the girls, and the charge I think is grinding, because that was, that's what we heard from a lot of the witnesses. He would move them back and forth on his legs. And in fact [T.J.] got up, and as you remember, stood up and actually showed you what he was doing, in gruesome detail, as he's holding 8, 9, 10-year-old girls, [T.J.], or [Sh. E.-T.], and first [S. E.-T.], he would do this.

* * *

And then he would take a step further, in the basement, have her come down in the basement. I have something for you, or, you're in trouble. And it was in the basement where the defendant then escalated the contact, when he was away from other people. I would argue to you at that point they were up in the living room, he was doing some other things, and nobody was saying anything.

So then he took it a step further, and in the basement that is when he began to, as she described, dry hump <u>them</u>, with <u>their</u> clothes on, but then the defendant would grind up against her.

* * *

Again, how do we know she's not making this up? How do we know that there isn't some grudge? Because we haven't heard any, we haven't heard a reason that [T.J.] would make any of this up. We haven't heard a single reason. She has no motive to lie, none whatsoever.

There's no reason for her to come forward and tell her mother. She didn't go to the police herself. She told her mother, and after talking to her mother, we should go to the police now. That's how that happened. **This wasn't a set-up. And in fact you heard the girls hadn't spoken to each other in some time. They didn't collude with each other and say hey,**

remember what happened over a decade ago? Let's go get him. No evidence of that whatsoever.

And so how do you know that this isn't fabricated? Because you heard what happened to the other girls. You heard what happened to [T.C], [T.C.] describing what was done to her, that in fact when she was alone with the defendant, he would grab her by the buttocks again, starting with this touching, and then escalating his conduct. Each and every one of the girls who testified, the women who testified said he used, talked about that exact same process.

And maybe not in the exact same way, and that's one of the things that I do want you to look at, is that it wasn't that with [T.C.] he did the touching. Remember, we heard about the game who can jump higher, and that's where he would grab the buttocks and then kind of, and move his hand lower and lower and lower and lower.

But with [Sh. E.-T.], with [S. E.-T.], and with [T.J.], it was the grinding against them. But then he took these, this first step. This is the same type of first step we see with each and every one, each and every one of (unintelligible), that he would then escalate his conduct.

And you heard with [T.C.] and [Sh. E.-T.], he took the same time—they were both sleeping and awoke to the defendant on top of them. Both of these witnesses said I woke to the defendant on top of me. <u>He took advantage of the vulnerability of these women.</u>

* * *

And that was [Sh. E.-T.], and you saw how hard that was for her . . . where she looked and said do I have to say this. You saw how painful that was for her, to have to come in front of 14 people she doesn't know, she's never met, and talk about one of the worst things that's ever happened to her. You saw what happened. It's another way you know that not only was [Sh. E.-T.] being, was [Sh. E.-T.] telling you what happened, but that [T.J.] is not making this up.

* * *

Now the defendant is not charged with any of the events relating to [T.C.], to [Sh. E.-T.] or [S. E.-T.]. That's not the charges. But the purpose of you hearing about those victims was to show, was to rebut this that [T.J.] made it up, was to say how do you know that she didn't

> **make this up. Because this is what happened to other people, what the defendant did, and you can use it for that reason. You can use it for that purpose. You can say well, we know that she's not making this up. She's not fabricating this, because the girls didn't really talk specifics, but yet the stories are lining up.**
>
> * * *
>
> **You heard there were subtle differences, and there were, because each victim, each woman was treated differently, a little bit. But he took the same steps, and that's what I want to submit to you. That's how you know [T.J.]'s not making this up, is that when you look at all of the evidence, when you look at what happened, and the way that each of the witnesses testified, you know beyond a reasonable doubt that in fact the defendant did sexually abuse (unintelligible).**

(Emphasis added.)

In his closing argument in response, defense counsel set forth the reasons the jury should decline to find that Irby had abused T.J., including: (1) the fact that T.J.'s mother had testified that she was very supportive of her daughter, so when she asked T.J., after T.C. came forward in 2011, if anything had happened between her and Irby, T.J. had no reason to deny abuse; (2) T.J.'s explanation that she was upset at Irby's family's treatment of her during her father's funeral may have caused her to hold a grudge against them; (3) the fact that the statements of the three women when interviewed by the police in 2011 differed greatly from their statements offered during the trial; and (4) Irby's credible testimony that he was "not the type of person that would do these things."

During rebuttal closing argument, the prosecutor responded to those statements, telling the jurors that even if they believed the only thing that had happened to T.J. was what she initially told her mother, that is, that Irby touched her "weird,"

[i]t's still sex abuse of a minor, because it is still sexual exploitation, because he's using the child for improper benefit. That's what he's doing. That's why he's touching them. That's why he's hugging them weird.

When you say hugging them weird, what's he doing? We know what he's doing. He's grabbing their private areas. He's grabbing their buttocks. He's touching their breasts. He's doing all of these different things. That's what touching, hugging them weird means.

* * *

The games that the defendant was playing with these girls as they got older, that's different than playing baseball with your kid. It's not the same. We're talking about the actual touching of a person.

* * *

We're talking about the way the defendant touched these women as they grew up, as they were no longer toddlers, as they were no longer in elementary school, like they're getting into middle school. [T.C.] was almost 16 and it was still going on. She's a grown woman at that point, and he's doing the same thing.

That shows you how the defendant was acting, that this was not something just playful. This was a deliberate act to touch these women for his own purpose, and that's what he was doing, and that's what this shows. That's what the evidence shows.

* * *

And so to then go and say that people can hold grudges, that people hold grudges, people are offended, and therefore they're going to hold on to these grudges. That doesn't lead you to then make up allegations of sexual assault. That doesn't lead to that. That doesn't lead to over a decade later saying that this is what he did to me, that when I said he hugged me weird, yes, he did that, but all these other things that happened.

That type of holding a grudge, because your name wasn't in the obituary, because your picture wasn't where you wanted it to be, that doesn't lead to you making up allegations of sexual assault, especially if it's somebody that you don't see on a normal basis.

> **There is, throughout this entire trial there has been no motivation shown for these girls to say he sexually assaulted them. In fact you heard, and there's no contradictory testimony, that once 2011 hit, the defendant left the area, that at that point he was gone. He was in New York.**
>
> **Why, if he's gone, if they're not coming into contact with him. You see him one time at a funeral. There's no motivation to then come three years later, 2019, and then make things up. It doesn't make sense.**

(Emphasis added.)

The underscored portions of the prosecutor's closing arguments, above, are the comments Irby asserts are improper references to propensity evidence.[10] Although Irby acknowledges that "the State sometimes properly used the other women's testimonies to refute the allegation of fabrication," he claims "that was not always the case. On seven distinct occasions, the State harped on the women's testimonies with no reference whatsoever to refuting fabrication." Those seven occasions, he concludes, comprise reversible error. We disagree.

Our courts have made clear that attorneys are to be afforded "great leeway" in presenting closing arguments to the jury. In a criminal matter, "'[t]he prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Spain v. State,* 386 Md. 145, 152 (2005) (quoting *Degren v. State,* 352 Md. 400, 429-30 (1999)). What exceeds the limits of "'permissible comment or argument by counsel'" must "'depend[] on the facts of each case.'" *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Smith v. State*, 388 Md. 468,

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[10] The portions emphasized in bold type pertain to our conclusion that the prosecutor did not stray from the bounds of permissible argument and will be discussed, below.

488 (2005)). In reviewing the propriety of the prosecutor's comments, we consider them in the context of the closing argument and the trial as a whole. *See Washington v. State,* 191 Md. App. 48, 109 (2010) ("Comments made in closing argument must be weighed in their context."); *see also Oken v. State,* 343 Md. 256, 295 (1996) ("Reading the prosecutor's closing argument in context, however, we do not believe the statements were comments [that violate the defendant's constitutional rights.]").

When reviewed as a whole and in the context of the entire closing argument and rebuttal closing argument, it is clear that Irby was not denied any right to which he was constitutionally entitled. As illustrated by the portions of the arguments that we have emphasized in bold type, the prosecutor made very clear to the jury that his references to the testimony of Irby's other victims to show that they experienced the same behavior as did T.J. were properly aligned with the motions court's ruling that their generally consistent testimony was admissible to refute any claim by Irby that T.J. had fabricated her accusations against him. We disagree with Irby's assertion that the State was required to "preface each remark on the women's testimonies with something akin to 'this is how we know that T.J. is not fabricating her story.'" Even in the examples in which Irby complains that the prosecutor did not specifically introduce his comments about the other victims' testimony with an explanation as to why that evidence showed that T.J. had not fabricated her testimony, we are confident the jury understood the purpose of the evidence, especially in light of the trial court's clear instruction on the topic. There is nothing to suggest that the State improperly used the testimony of T.C., Sh. E.-T., and S. E.-T. to argue in closing that Irby had a bad character or a propensity to commit crime.

B. State's Closing Arguments Relating to Irby's Prior Second-Degree Assault Conviction

Irby next claims that the prosecutor, in his rebuttal closing argument, improperly relied on Irby's 2011 guilty plea in relation to second-degree assault of T.C. as substantive evidence of other sexually assaultive conduct, despite the fact that the trial court had deemed it inadmissible for that purpose and admitted it at trial only as impeachment evidence. Again, we disagree.

Prior to trial, the motions court found that Irby, in his 2011 plea bargain, admitted only to an unconsented touching, not to a sexual offense. As such, the court was "[n]ot sure it rises to the level that would allow me to admit this as him saying he touched them in a sexual manner." The motions court ruled that the plea agreement could perhaps be "used to cross-examine him as prior testimony, or something along those lines," but not as prior sexually assaultive behavior under CJP § 10-923.

When Irby elected to testify, the prosecutor asked him upon cross-examination if he had touched T.C. after she asked him to stop. Irby responded, "No, I did not." As a result of Irby's denial of unwanted touching, the prosecutor advised the trial court that he was "going to go into the plea." The court admitted the plea bargain hearing transcript and certified copy of the conviction as "relevant for impeachment purposes[.]"

Later, the court instructed the jury:

> You have heard testimony that [T.J.], [T.C.], [Sh. E.-T.], and Bobby Irby made a statement before trial or at another hearing. Testimony concerning that statement was permitted only to help you decide whether to believe the testimony that the witness gave during the trial.
>
> It is for you to decide whether to believe the testimony of [T.J.], [T.C.], [Sh. E.-T.], and Bobby Irby in whole or in part, and you may not use

> the earlier statement for any purpose other than to assist you in making that decision.

During his closing argument, the prosecutor addressed Irby's 2011 plea bargain:

> And I would submit to you he was trying to say anything he could to distance himself from the situation, to deny, to get away from anything that could possibly incriminate him. Even when it's written down, it's on tape, he still denied it.
>
> I asked him point blank, didn't you admit that you touched [T.C.] without her consent. He said no. Well, you'll have this in the jury room. When he pled guilty, that's what he said he did. Specifically there was the part that we read, where there's this part and you'll see it says any corrections, additions. There was no fondling of the buttocks or vaginal areas, but there was, he did pick her up, he did tickle her after she said she did not want to be touched. He picked, and then there's another part where it says he picked her up after she said she did not wish to be touched.
>
> So under oath, and he said he didn't remember being under oath, well, again, here he's under oath, as clear as day, that he admitted that he touched [T.C.] without her consent. That does not have anything to do with anything of a sexual nature. That was in 2011.

In response, in his closing argument, defense counsel countered:

> You heard from him how he didn't review the plea hearing from 11 years ago, so he didn't know what was in the plea hearing and what exactly happened 11 years ago.
>
> You'll also see in the plea hearing that Mr. Irby isn't the person who did the talking, that it was his lawyer at the time who did the talking and who made those statements about what did and didn't happen.
>
> Mr. Irby admitted to what he did wrong that day, that he tickled [T.C.] when she didn't want to be tickled. He admitted that, and he admitted as part of the plea agreement that it wasn't a sex offense. It was just a touching that she didn't want. It was a second degree assault, which you heard the instruction about, these are one of the charges you're going to consider today.

In reply, in his rebuttal closing argument, the prosecutor offered:

> I would also submit to you, you heard a little bit about well, the second degree assault that he pled to. Well, this trial, I would submit to you and I'll refer you to, if you look at that, that type of act is still sexual exploitation, still the sexual abuse of a minor. That's what is in this case. It is touching the girls for his own benefit. He's touching them, again, it doesn't have to reach the level of sexual offense, but it's still sexual exploitation.

It is this portion of the rebuttal closing argument to which Irby assigns error, on the ground that evidence of his plea bargain was admissible only for impeachment purposes but the State's argument improperly referred to it as evidence of other sexually assaultive behavior.

In our view, the prosecutor's rebuttal was in direct response to defense counsel's assertion that the plea bargain resulted not from a sex offense, but rather "just a touching that [T.C.] didn't want." The prosecutor used the evidence of the plea bargain only as impeachment evidence during trial and in his initial closing argument, as permitted by the trial court after Irby denied having touched T.C. after she told him to stop. But, when defense counsel insisted that the plea bargain related to nothing more than an unwanted touching, the prosecutor was permitted to respond by pointing out evidence adduced at trial, through T.C.'s testimony, that tended to show that the "type of act" that led to Irby's second-degree assault plea was still sexually exploitative of a young girl, even if it did not lead to a sexual offense conviction. *See Mitchell*, 408 Md. at 388 ("The 'opened door' doctrine is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel."); *see also Brown v. State,* 339 Md. 385, 394 (1995) (stating that the State's rebuttal closing argument is proper if it is "nothing more than a reasonable reply to the arguments made by defense counsel" (quotation marks omitted)).

Moreover, the prosecutor's single careful reference to Irby's act of picking T.C. up and tickling her as sexual exploitation that may not have reached the level of sexual offense was unlikely to have misled the jury to Irby's prejudice or swayed it to convict, especially in light of the weight of the credible evidence of his sexually assaultive behavior toward T.J. presented at trial. *See Donaldson v. State*, 416 Md. 467, 496-97 (2010) (A prosecutor's comments require reversal only "if it appears that the . . . remarks actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice[,]" and "[t]o determine whether improper comments influenced the verdict," a reviewing court "consider[s] the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." (quotation marks and citations omitted)).

C. State's Closing Arguments Relating to Irby's Apology to T.C. and his Grandchildren

Upon cross-examination, the prosecutor questioned Irby about whether he remembered apologizing to the children during his 2011 interview with the police. Irby responded that the officers had asked if he wanted to apologize and so he said, "I'm sorry for playing with the kids."

When the prosecutor sought to clarify whether Irby had actually said, "I'm sorry for the way I played with you[,]" Irby reiterated that he had said he was "sorry for playing with the kids. That's what I told the detectives." The State then played for the jury the audio recording of the interview in which Irby apparently apologized for the way he played with the children. On redirect examination, Irby again claimed to have apologized "for playing with the kids."

During later discussion about jury instructions, the trial court confirmed with counsel that any prior statements had been introduced for the purpose of impeachment, not as substantive evidence. The court crafted a jury instruction in accordance with that agreement by counsel.

Irby now claims that the prosecutor, in his rebuttal closing argument, used the apology as substantive evidence that Irby apologized to the children for bad behavior, rather than as impeachment of his credibility regarding the wording of the apology. Again, however, Irby, in his brief, omits defense counsel's closing argument on the issue, which is pertinent to a determination of the propriety of the prosecutor's rebuttal.

During his initial closing argument, the prosecutor referred briefly to Irby's apology:

> The fact of the matter is that even when confronted with the things that are recorded, he still tried to backtrack from it. The apology that you heard, that you'll also have, where he says I'm sorry for the way I played with you. The way, is what he says, and the defendant kept saying that's not, no, I said sorry I played with you. That's not what he said. When I played it for him I had him put the earphones in, and he still would try to deny.

Defense counsel, in closing, returned to the apology:

> The State also talked to you and may play in rebuttal the end of his statement to the police that he made in 2011. As you heard from the detectives, all the interviews happened late at night, and that statement was made at the end of the interview, and it's an apology. And as Mr. Irby told you, it is an apology that the police suggested he make. And the State is trying to make that into some sort of big admission.
>
> But I submit to you that I think any reasonable grandparent, hearing a suggestion that they apologize to their grandkid who is affected or upset about something, would make that apology, like any reasonable person would make such an apology. And I think that that's something you can use your own experience to note that people often apologize, not necessarily

> because they think they did, committed a horrible thing or have the same view of something, but because apologies help. They help make situations better. They help heal whatever wounds exists.
>
> And the last thing, I think as you saw from Mr. Irby, I think Mr. Irby's testimony shows that the last thing Mr. Irby ever wanted to do was to harm or hurt his family. And so an apology of course would be the natural thing for him to do and to say.

In his rebuttal closing argument, the prosecutor responded:

> Now the part about the apology. Defense counsel said well, any reasonable person would make an apology to make somebody feel better. We are not talking about I'm sorry I left the milk out and it went sour, I'm sorry that I didn't go to the grocery store, I should have gone to the grocery store. I'm sorry that I said something that, you know, that you felt offended by that I, I'm sorry, I didn't mean it that way.
>
> We're talking about sexually abusing children. You don't just apologize for that. You don't just say I'm sorry for the way I played with you, when you are being accused of sexual assault. That's not a reasonable response.
>
> You don't, you're not going to say oh, I'm going to apologize. I'm being accused of sexual assault. That's hell no, I didn't do that. I'm not apologizing for something like that. That's what is reasonable, not I'm going to apologize, like I would apologize for saying something that offended somebody, or something like that. They're not the same.

The prosecutor, in his initial closing argument, remained within the bounds of the court's limit on the use of the apology as impeachment of Irby's credibility regarding the wording of the apology. It was defense counsel who suggested that "the State is trying to make that into some sort of big admission."

Thereafter, the State's rebuttal was again in direct response to defense counsel's argument that Irby's apology to the children was of no moment to the sexual offense charges because any reasonable grandparent would apologize to his grandchildren if asked

to do so by the police, even if he hadn't done anything wrong. The prosecutor did not, as Irby characterizes his rebuttal, "use[] the apology as substantive evidence that Mr. Irby apologized for sexual assault[.]" Instead, the prosecutor pointed out how incredible it was for the defense to suggest that a reasonable person who hadn't committed sexual assault would nonetheless apologize, especially when that person later denied the wording of the apology, even after having been impeached with a recording of the apology. Indeed, the prosecutor, later in his rebuttal closing argument, clarified:

> And when you're confronted with the facts, and you still deny it, that tells you something. That tells you how to evaluate the credibility of the witness, and that is the purpose behind why you heard the part about the apology. It wasn't for this big old grandiose, as Defense counsel would like to say, but here it's that's what he said. I apologize for the way I played with you. I know it's one word, but it's important, because he was apologizing for the way he played with them, because he knew it was wrong. He knew he shouldn't have done that.

In our view, the prosecutor permissibly tailored his response to defense counsel's closing argument. And, again, we conclude that the prosecutor's comments about the apology were unlikely to have misled the jury, in light of the weight of the evidence against Irby. We therefore perceive no reversible error in the prosecutor's comments about Irby's apology to the children.

II. Closing Argument Relating to Reasonable Doubt Standard

Irby also argues that the trial court erred in permitting the prosecutor to argue "an alternative reasonable doubt standard to the jury[,]" which deviated from the jury instruction on reasonable doubt as given by the trial court and was analogous to the lower standard of proof by preponderance of the evidence. Irby claims that the statements were

improper and necessitate reversal because counsel is not permitted to argue law to the jury or to embellish the trial court's instructions.

The trial court's instruction to the jury on the reasonable doubt standard was an almost *verbatim* recitation of Maryland Pattern Jury Instruction-Criminal 2:02:

> 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 shortly. This burden remains on the State throughout the trial.
>
> The defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt, or to a mathematical certainty, nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact, to the extent that you would be willing to act upon such belief, without reservation, in an important matter in your own business or personal affairs.
>
> If you are not satisfied of the defendant's guilt to that extent, for each and every element of the crimes charged, then reasonable doubt exists and the defendant must be found not guilty of those crimes.

In his rebuttal closing argument, the prosecutor discussed the concept of reasonable doubt:

> And it's because the evidence in this case is overwhelming. It shows beyond a reasonable doubt, you heard a lot about reasonable doubt, and you know the reasonable doubt instruction is not the best worded instruction ever.

> You know, in elementary school we always learned don't use the phrase you're trying to define in a sentence to have it make sense, and we have a reasonable doubt is a doubt founded upon reason.
>
> But it talks about making a decision in your own personal or financial affairs, without reservation. We do this every day, as we evaluate our own lives. Where to buy a house. (Unintelligible)—
>
> * * *
>
> You're making these evaluations. You're looking at the pros, you're looking at the cons, and then you make your decision without reservation at that point. Once you look at everything you have, where to send your child to daycare—
>
> * * *
>
> You're making those decisions as you evaluate all the evidence that you have, and when you look at what you have, what you don't have, and you can make your decision. You make your decision without reservation. That's what the instruction is, and that's what we are talking about because these are, this is the highest level, the highest burden of proof in our criminal justice system, and it should be. This, it should be this way.

(Emphasis added.) Again, it is the underscored portion of the rebuttal closing argument that Irby contends comprises reversible error.

The reasonable doubt standard of proof is an evidentiary component that is the cornerstone of a fair criminal trial. *Ruffin v. State*, 394 Md. 355, 363 (2006). "In commenting on the State's burden of proof, counsel's closing argument must not undermine the judicially approved pattern definition of reasonable doubt." *Anderson v. State*, 227 Md. App. 584, 590 (2016). That is because allowing counsel to "embellish the trial court's instructions is fraught with the danger that the trial judge's binding instructions will be manipulated by counsel, resulting in the jury applying law different than that given by the trial court." *White v. State*, 66 Md. App. 100, 118 (1986).

In *Carrero-Vasquez v. State*, 210 Md. App. 504, 510 (2013), the prosecutor, in rebuttal closing argument, told the jurors they should convict the defendant if their "gut says I think he's guilty[.]" (Emphasis omitted.) We held that the remark was improper because it "plainly reduces proof 'beyond a reasonable doubt' to a 'gut' feeling." *Id.* at 511. After applying a harmless error analysis, we reversed. *Id.* at 512-15.

In *Rheubottom v. State*, 99 Md. App. 335, 339 (1994), the prosecutor argued to the jury, over defense objection, that in order to have reasonable doubt "you will need to articulate and be able to write down on a piece of paper why and what your doubt is, if you've got one, and if you can't do that, specifically, then there's not a reasonable doubt." Defense counsel requested a curative instruction, which the court denied. *Id.* After applying a harmless error analysis, we reversed. *Id*. at 341-45.

This is not a situation like *Carrero-Vasquez* or *Rheubottom*. We do not think the examples given by the prosecutor in the instant case, *i.e.*, where to buy a house or where to send one's child to daycare, are nearly as minimizing as the "trust your gut" remark in *Carrero-Vasquez* or the requirement that a reasonable doubt must be expressed on paper, as stated in *Rheubottom*.

The prosecutor's reasonable doubt remark comprised less than one sentence in rebuttal closing argument and was made over the course of 44 transcript pages of closing argument by the parties. The prosecutor—several times—properly explained to the jury that the concept of reasonable doubt was about making important decisions in the jurors' lives "without reservation." The jurors gave no indication that they were confused by the State's reasonable doubt remark.

The trial court properly instructed the jury on reasonable doubt, and Irby does not argue to the contrary. The trial court also properly instructed the jury on the presumption of innocence, the State's burden to establish each element of the offenses beyond a reasonable doubt, that opening statement and closing argument are not evidence, and that the jury was to follow the law as given by the court. We presume that the jury followed the court's instructions. *See Carter v. State*, 366 Md. 574, 592 (2001) ("[J]urors are presumed to follow the court's instructions[.]").

For all these reasons, and in light of the evidence of Irby's guilt that weighed heavily in the State's favor, we cannot say that the jury was misled or likely to have been misled by the prosecutor's comments. *See Degren v. State*, 352 Md. 400, 431 (1999) ("We have said that reversal is only required 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." (cleaned up)).

Therefore, we find no reversible error in the prosecutor's brief comments relating to the reasonable doubt standard.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.