Circuit Court for Prince George's County
Case No. CT161082X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1943

September Term, 2017

PERCY ODELL WILLIAMS

v.

STATE OF MARYLAND

Shaw Geter,
Fader, C.J.,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: September 13, 2019

At the conclusion of a three-day jury trial in the Circuit Court for Prince George's County, appellant, Percy Odell Williams, was found guilty of one count of third-degree sex offense and two counts of sexual abuse of a minor. Appellant was sentenced to the following: count two (third-degree sex offense) 5 years' incarceration with all but six months suspended; count three (sexual abuse of a minor) 20 years' incarceration with all but seven years suspended to run consecutive to count two; and count five (sexual abuse of a minor) 20 years' incarceration with all but seven years suspended to run consecutive to counts two and three. He timely filed this appeal and presents the following questions for our review:

1. Whether the trial court erred by allowing the State to admit into evidence and publish appellant's wife's videotaped statement to the jury?

2. Whether the court committed error by allowing other crimes evidence to be admitted against the appellant?

3. Whether the court committed error by not granting a mistrial after the State's rebuttal argument that included (a) burden shifting, (b) vouching for the witness, and (c) misstatements of law?

4. Whether there was sufficient evidence to convict the appellant of any charges?

5. Whether Pastor Chase should have been precluded from testifying because of the penitent privilege?

BACKGROUND

Appellant met the victim C.G., born September 1998, when she was thirteen years old at their church in Washington, D.C., where he served as a youth minister. C.G. alleged that beginning in the summer of 2013, appellant had sexual intercourse with her. In September 2013, because of unrelated issues at her home, C.G. moved in with appellant

and his family to a residence in Prince George's County. She stated thereafter appellant had sex with her two or three times per week. C.G. testified the parties had sexual intercourse in appellant's home in September 2013. She also recounted an incident on Halloween 2013 where appellant digitally penetrated her. Additionally, C.G. described a third encounter that occurred in November of 2013, where she and appellant engaged in sexual intercourse.

On July 31, 2016, C.G. disclosed her relationship with appellant to a friend and together they approached their pastor, Jalene Chase Sands ("Pastor Chase"). After hearing from C.G., Pastor Chase went to appellant and asked him "what had been going on between him and [C.G.][.]" Appellant stated in response that "[C.G.] is just mad because the last time that we went on vacation we didn't have a lot of daddy/daughter time." Pastor Chase then directly asked if he had "been having sex with [C.G.][.]" Appellant dropped his head and said, "I messed up." Appellant attempted to explain the situation stating "she had come on to him" and that "he was weak and he gave into temptation." During the conversation, Pastor Chase told appellant that he needed to tell his wife. Pastor Chase asked him to bring his wife back into the office so the "healing [could] start."

When appellant and his wife returned to the office, Pastor Chase told appellant to tell his wife the truth and he began to apologize and express his love to her. Appellant stated that he "did something inappropriate with [C.G.]." In response Pastor Chase threatened that she "would tell [appellant's wife]" if he did not. Pastor Chase then relayed that appellant had been "having sex with [C.G.]." After both appellant and his wife left, Pastor Chase called child protective services and the police.

A. Detective Penilla's interview with appellant's wife

As part of the State's case, appellant's wife was called to testify about her relationship with C.G. as well as being her legal guardian. When asked if she remembered appellant admitting his sexual relationship with C.G. to her, she indicated that she did not. The State asked, "did your husband deny having sex with [C.G.]?" In response she stated "I don't know. I don't remember." The State then asked to mark a video statement appellant's wife made to Detective Penilla as "Exhibit 1." After a brief bench conference, the State continued to ask appellant's wife questions about her husband's disclosure of his sexual relationship and the following colloquy ensued:

[State]: Okay. And what did he tell you about [C.G.]?

[Wife]: Hum, I said I don't remember his exact words?

[State]: You don't have to say his exact words.

[Wife]: Hum, I believe he said that something hum, happened.

[State]: What did he tell you happened?

[Wife]: As I said, I—I don't recall everything he said. I—we talked. Oh, sorry.

[State]: You can say.

[Wife]: Oh, I'm sorry. We talked, so I can't remember. That was like I said just 2013.

[State]: No that was 2016.

[Wife]: I'm sorry, 2016. But it was a while ago.

[State]: So, you don't remember him saying he was having sex with C.G.?

[Wife]: No. I don't remember everything he—

[State]: Did he deny having sex with C.G.?

[Wife]: I don't remember everything he said.

[State]: Okay, and that's a record of your interview with the detective. Correct?

[Wife]: Yes.

The State then moved to enter "Exhibit 1," Detective Penilla's interview of appellant's wife, into evidence as a "past recollection recorded." Appellant's counsel objected arguing the witness "never denied talking to the pastor" and never denied "being in the police station." The court overruled the objection and the video statement was shown to the jury. During the video, appellant's counsel again objected, and moved to strike, arguing the wife stated, "the pastor told her" the information she shared with the detective and that the statement on the video was multilevel hearsay. The court ultimately ruled the "part where she specifically said, my pastor told me this" would be stricken.

B. Evidence of appellant's other crimes

As part of the investigation, appellant was interviewed by Detective Starr. Following being advised of his Miranda rights, he signed a written waiver and agreed to answer questions. Williams then made several admissions to having sexual contact and intercourse with C.G. He also admitted having sexual intercourse with her in Washington, D.C. in 2013. Prior to trial appellant filed a motion to suppress his statement. The suppression court ruled that portions of appellant's statement made after Detective Starr made a promise to appellant would be suppressed. The court, however, ruled that

statements made by appellant prior to the inducement would not be suppressed.

At trial, the State sought to admit appellant's statement and appellant objected. The State argued appellant's statement about his sexual encounter with the victim in D.C. should come in under Rule 5-404(b) other crimes or acts to show a common scheme or plan, and for identity purposes. In response, appellant argued that the case did not involve an identity issue because "every witness who comes in here has testified this is Mr. Percy Williams," and that the statement had "no real probative value," but instead had "a major prejudicial effect."

Ultimately, the court held that the "act [was] not admissible to prove the character of a person in order to show conformity," although "it will be allowed in . . . the evidence may be admissible to show corroboration, credibility, show motive, show opportunity, to show intent, scheme, or plan."

C. The State's rebuttal response to appellant's closing argument

During closing argument, appellant's counsel asserted "there [was] no question that Mr. Williams had inappropriate behavior with Ms. [C.G.], no question," but warned that "this jury is here to look at the charges and only the charges that are before you." Continuing counsel contended, "It's for another court and for another time for other charges" and that "[w]hat happened in the summer, July or August of 2013 is not before you." Appellant's attorney asserted "we're not here for what may have happened in 2016 at a vacation" and suggested "there was nothing that [the State] can say to corroborate anything about [the alleged] dates[.]" Appellant's lawyer stated "September the 19th, October 31st, and the month of November, all in 2013 she was bubbly and happy" arguing Pastor Chase's

characterization of C.G.'s 2016 response to alleged abuse that had occurred years earlier was inaccurate.

Counsel argued "that there's nothing that was here that the state presented that proves on about [sic] September 19th, 2013 that my client committed any third-degree sex abuse" implying that "[i]t didn't happen . . . No evidence of it. Nothing credible at all."

In addition, appellant's counsel alleged:

> Is it coincidental—I ask you is it coincidental that the training of Detective Starr has is we [sic] tried to pick important dates around something so the person can possibly remember something may have happened around there? Or, is it more sinister than that? Or by Detective Starr picking those dates, suggesting those dates. We don't know. You know why we don't know? It's because we saw Mr. Williams right there being interviewed. We saw Mrs. Williams on that day being interviewed.
>
> Now, Detective Starr said she interviewed [C.G.]. We are here. Any witness, any evidence, any deficiencies in evidence rests in one place and one place only that's with the State. What are they hiding? What are they hiding?

Following appellant's closing, the State, addressed the jury in rebuttal. The State emphasized that the law "allows" the use of "on or about" in charging documents. The State suggested that "in a case of child sex abuse" remembering dates is difficult. Moreover, the State addressed the sufficiency of the evidence and testimony presented, stating:

> Defense counsel said, oh, there's no tangible evidence. There is no tangible evidence. This is something that happened in 2013. Shall we get their sheets and look for sperm or maybe check her vagina for sperm? Oh, wait. Years have passed. Those sheets have been washed. I hope she has bathed herself.
>
> He takes in the person he is having a sexual relationship with. He brings her to his home, and we know he continues to have sex with her because he says it even in his statement.

> There is no refuting it. And we know it's during the time that he has a closer relationship with her because he says, he says I can't tell you the exact numbers because I suppressed it because I had to be a father to the two of them, meaning to his other son and to her.
>
> So, five to seven times, not a hundred percent sure. It was not a one time deal. He didn't have sex with her one time, and that's it.
>
> That just corroborates what she said to you happened. You didn't have evidence? Yes, you did. She got up there. She testified. All you actually needed was her word.
>
> You didn't hear anybody come up and refute that that didn't happen. In fact, you heard evidence that he did it. She gave you the dates. So, when you get back there you're going to see that reading is very important.

The State later pivoted and responded to remarks made by defense counsel regarding the victim's recorded statement:

> Defense counsel brought up the recorded interview. You heard over and over again how he objected to that. No one could say what [C.G.] said because it's hearsay.
>
> The defendant's statement comes in because it's his statement. It's against his interests. That's why it comes in.
>
> . . . .
>
> You don't get [C.G.]'s interview because that's hearsay. But if there were some things that she said that was—If she testified to something and she said something different in that statement to the police, defense counsel would have impeached her.
>
> He would have been, like, hey, isn't it true—he could have played the video at that point and said, hey, isn't it true that in your interview you said A, B, and C? Now, you're saying something different. He could have impeached her. He had the interview.
>
> There was no impeachment because she always said the same thing. And that's enough for you to find her credible. And I ask that you find him guilty of all charges. Thank you.

Immediately following the above remark, appellant's attorney asked to approach the bench and proffered that the State had referenced "evidence that was [not] talked about, evidence that's not even close to what could be." Appellant's counsel further contended the State had "shifted the burden" to the appellant "when she said the defendant put up no evidence to refute what [C.G.] said" and counsel emphasized that appellant had "no obligation to refute anything."

Attorney for appellant motioned for a mistrial, which the court denied. The court then gave additional instructions on the burden of proof, presumption of innocence, appellant's right to elect not to testify, and the nature of opening and closing argument.

We will incorporate additional facts in our discussion of the issues as they become necessary.

DISCUSSION

I. The court committed harmless error in admitting into evidence the recording of appellant's wife's statement.

Appellant argues that the State should not have been permitted to play his wife's statement as a past recollection recorded for the jury and the statement should not have been admitted as an exhibit. Appellant argues he made no admission in Pastor Chase's office to his wife and that any discussion about the alleged relationship with the victim was initiated by Pastor Chase. According to appellant, his wife's statements to the detective were statements made by Pastor Chase to the wife and as such were inadmissible hearsay. Conversely, the State argues appellant was the source of the information his wife gave to the detective and her statement also included information about a second encounter

between appellant and his wife in their home alone, where he told her about the inappropriate relationship. The State argues the portion of the tape where appellant's wife relayed the conversation was admissible hearsay, however, its actual admission into evidence was a "technical error [that] was harmless [.]"

"Whether evidence is hearsay is an issue of law" that we review *de novo. Gordon v. State*, 431 Md. 527 (2013) (citing *Bernadyn v. State*, 390 Md. 1, 7–8 (2005)). In determining whether an error is harmless the reviewing court must find "no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). A verdict is not reversed due to "harmless errors" and the appellant has the burden "in all cases to show prejudice as well as error." *Crane v. Dunn*, 382 Md. 83, 91 (2004).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. Maryland Rule 5-802.1(e) is an exception to the hearsay rule and provides for the admission of:

> A statement that is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly. If admitted, the statement may be read into evidence but the memorandum or record may not itself be received as an exhibit unless offered by an adverse

party.

Here the state sought the admission of the wife's video statement as a past recollection recorded following her failure to recall her husband's statements about sexual interaction with C.G. When asked if she remembered being interviewed by the detective, if it was her voice on the tape, if she remembered what appellant "first told [her] back then," and if her "memory was fresh," the wife responded, "I believe so" or "yes."

Appellant contends the video should not have been played "[g]iven how the videotaped statement of the wife was conducted, there was no opportunity to ascertain the source of the information and as a result obvious prejudicial hearsay evidence was published to the jury." Appellant makes note of a portion of the video where he made an objection when the wife stated, "my pastor told me."

The trial court ruled the video was admissible to the extent it contained statements made by appellant. We agree. The video clearly depicts the wife responding, "my pastor and my husband [appellant]," when asked "who told her" about the incidents. She then talks about what her husband relayed to her. While appellant argues it was multilevel hearsay, as we see it, the pertinent information relayed by the wife came directly from appellant.

Moreover, although the court did not articulate its ruling regarding probative value versus unfair prejudice, "there is a strong presumption that judges properly perform their duties in weighing the probative value and prejudicial effect of so-called other crimes evidence" thus, we recognize that "trial judges are not obliged to spell out in words every thought and step of logic in weighing the competing considerations." *Ayers v. State*, 335

Md. 602, 635–36 (1994). Additionally, a trial court is presumed to know the law and to apply it properly, and without evidence to the contrary, we find no reason to hold otherwise in this case. *Wisneski v. State*, 169 Md. App. 527, 555–56 (2006) aff'd, 398 Md. 578, 921 (2007).

While the court erred in admitting the videotape statement as an exhibit, in our view, it was harmless error and did not affect the outcome of the trial. The video was not sent back to the jury room and the jury did not request to review it during deliberations. Where a reviewing court is satisfied that the trial court's error did not influence the jury's decision, such error is harmless and does not mandate reversal of the conviction. *Dorsey v. State*, 276 Md. 638, 659 (1976). Such is the case here.

II. The court acted within its discretion when it allowed into evidence appellant's statement that he had sex with C.G. in July 2013.

Appellant argues his statements regarding having sex with C.G. in July 2013 in Washington, D.C. were improperly admitted as "other crimes" evidence. Specifically, appellant contends the court did not evaluate "the probative value versus the prejudicial effect of any 'other crimes.'" The State argues the evidence was properly admitted and "the court acted within its discretion in ruling that the probative value of the evidence outweighed any potential for unfair prejudice," even though the court did not specifically state that.

Typically, "[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Md. Rule 5-404 (2018). Evidence of other crimes however "may be admissible for other purposes, such as

proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.*

The Court of Appeals in *Vogel* recognized a "sexual propensity" exception to the rule excluding other crimes when: (1) the prosecution is for sexual crimes, (2) the prior illicit sexual acts are similar to that for which the accused is on trial, and (3) the same accused and victim are involved. *Vogel v. State*, 315 Md. 458, 465 (1989). In *Vogel*, the defendant was charged with child abuse, a sexual offense in the third degree, and battery, for performing fellatio on a child. *Id.* at 461. The Court concluded the State was properly permitted to introduce evidence that the defendant had previously performed fellatio on the child. *Id.* at 466. The Court based its reasoning on the fact that during the second incident the same sexual acts were performed by the defendant on the child. *Id.*

In *Acuna v. State*, the Court of Appeals elaborated on *Vogel* "sexual propensity" exception, stating:

> The sex crimes exception to the prohibition against other crimes evidence differs markedly from other evidence that is excepted from that rule. When evidence of other crimes is admitted because it has special relevance tending to establish, for example, motive, intent, absence of mistake, identity, or common scheme, the evidence is relevant to an issue other than the character or propensity of the accused to commit crime. But the evidence of prior offenses admitted in *Vogel* was "admissible 'to show [that the accused had] a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial....'"

332 Md. 65, 74–75 (1993) (internal quotations and citations omitted). Here, the other crime mentioned falls under the "sexual propensity" exception. The crime being charged was a "sexual crime;" the other crime was similar as it was sex with C.G. in

Washington, D.C., and the appellant was charged with having sexual intercourse with her in the case at bar.

In further analyzing whether evidence of other crimes not charged can be admitted, a trial court must determine if the evidence falls within a "legitimate exception to the rule of presumptive exclusion," a legal determination not calling for any exercise of discretion. *Solomon v. State*, 101 Md. App. 331, 338–39 (1994). The trial judge must be persuaded "by the clear and convincing standard, that the alleged crime, did indeed, take place" and the final step requires the trial judge to "weigh the necessity for and probative value of 'other crimes' evidence against any undue prejudice." *Id.* at 338–39.

Here, appellant contends because the court did not vocalize its finding that the probative value of the other crime outweighed the prejudicial value, there was error. However, as previously stated, "a trial court is presumed to know the law and apply it properly[;] [n]or must a trial court spell out every step in weighing the considerations that culminate in a ruling." *Wisneski v. State*, 169 Md. App. 527, 555–56 (2006), *aff'd*, 398 Md. 578 (2007). Further, the *Acuna* Court noted that "in a sex offense prosecution, when the State offers evidence of prior sexual criminal acts of the same type by the accused against the same victim, the law of evidence already has concluded that, in general, the probative value, as substantive evidence that the defendant committed the crime charged, outweighs the inherent prejudicial effect." 332 Md. at 75. Thus, we hold the court did not abuse its discretion in admitting "other crimes" evidence.

III. The court acted within its discretion when it denied appellant's motion for a mistrial.

Appellant claims he is entitled to a mistrial because the State's rebuttal during closing argument "constituted burden shifting, impermissible vouching, and misstatement(s) of law." The State contends appellant "opened the door to [most] of the statements" and the court acted within its discretion by denying the mistrial and reinstructing the jury on the burden of proof.

We note "[a] trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380–81 (2009)). "We do not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Id*. (citing *Grandison v. State*, 341 Md. 175, 225 (1995)). Since a mistrial is an "extreme sanction" when reviewing a denied motion, we only reverse the trial court when it is established that "the defendant was so clearly prejudiced that the denial constituted an abuse of discretion." *McIntyre v. State*, 168 Md. App. 504, 524 (2006) (citing *Garner v. State*, 142 Md. App. 94, 102 (2002)).

Burden Shifting

Attorneys are allowed "great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400 (1999) (citing *Henry v. State*, 324 Md. 204, 230 (1991), *cert. denied*, 503 U.S. 972, 112 S. Ct. 1590, 118 L.Ed.2d 307 (1992)). Counsel is permitted to make arguments "warranted by the evidence proved or inferences therefrom[,]" but such arguments are improper when counsel makes "statement[s] of fact not fairly deducible from the evidence." *Anderson v. State*, 227 Md. App. 584, 589 (2016). This Court reasoned:

> [T]he prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces.

Mitchell, 408 Md. at 380 (citing *Wilhelm v. State*, 272 Md. 404, 412 (1974)).

During closing arguments, the prosecution is not allowed to highlight to the jury a defendant's failure to call a witness because doing so shifts the burden. *Wise v. State*, 132 Md. App. 127, 148 (2000). Prosecution comments speaking on a defendant's Constitutional right not to testify "are impermissible whether they be intended to call attention to the defendant's failure to testify or be of such character that the jury would naturally conclude that it was a comment about the failure to testify." *Id*. at 142.

In the case at bar, appellant contends the prosecutor shifted the burden "at least two times during the rebuttal portion of closing argument." Appellant first points to the following statement made by the prosecutor:

> You didn't have evidence? Yes, you did. She got up there. She testified. All you actually needed was her word.
>
> You didn't hear anybody come up and refute that it didn't happen in fact you heard evidence that he did it.

In response, the State contends this "remark did not shift the burden," it merely pointed out "that [appellant's] argument that no credible evidence of guilt existed was incorrect." We agree.

While the prosecutor did draw the jury's attention to the degree of the credible evidence in light of appellant's argument that there was none, her statements did not shift the burden of proof to him. The prosecutor did not directly or indirectly address appellant's

failure to call witnesses, and or testify on his own behalf. As such, the comments did not shift the burden.

Second, appellant contends the prosecutor's rebuttal shifted the burden after appellant made the following argument during closing:

> Is it coincidental—I ask you is it coincidental that the training of Detective Starr has is we [sic] tried to pick important dates around something so the person can possibly remember something may have happened around there?
>
> Or, is it more sinister than that? Or by Detective Starr picking those dates, suggesting those dates. We don't know. You know why we don't know? It's because we saw Mr. Williams right there being interviewed. We saw Mrs. Williams on that day being interviewed.
>
> Now Detective Starr said she interviewed [C.G.]. We are here. Any witness, any evidence, any deficiencies in evidence rest in one place only and that's with the State, not with us. That rests with the State. What are they hiding? What are they hiding?

To which, the prosecutor responded:

> Defense counsel brought up the recorded interview. You heard over and over again how he objected to that. No one could say what [C.G.] said because it's hearsay.
>
> The defendant's statement comes in because it's his statement. It's against his interests. That's why it comes in.
>
> The reason why you have seen the recording from Mrs. Williams is because she said she doesn't remember anything. And that it was accurate. And that's why it's a past recollection recorded. It's an exception to the hearsay rule.
>
> You don't get [C.G.'s] interview because that's hearsay. But if there were some things that she said that was—If she testified to something and she said something different in that statement to the police, defense counsel would have impeached her.
>
> He would have been, like, hey, isn't it true — he could have played the video at that point and said, hey, isn't it true that in your interview you said A, B,

> and C? Now, you're saying something different. He could have impeached her. He had the interview.

The State asserts the prosecutor's second argument was a response to arguments made by appellant's counsel that opened the door.[1]

"The opened door doctrine permits the admission of otherwise irrelevant evidence that has become relevant in response to the presentation of the other side's case." 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. *Mitchell v. State*, 408 Md. 368 (2009) (quoting *Conyers v. State*, 345 Md. 525, 545 (1997)) (citations omitted).[2]

[1] The State also asserts that if the statements are not permitted under the "opened door" doctrine then they are admissible under the "invited response" doctrine. "The 'invited response doctrine' suggests that where a prosecutorial argument has been made in reasonable response to improper attacks by defense counsel, the unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial." *Lee v. State*, 405 Md. 148, 168 (2008) (quotations omitted). We hold the statements made by the prosecutor were admissible under either doctrine.

[2] The Court of Appeals has held the "opened door" doctrine apples to both opening and closing arguments. See *Mitchell v. State*, 408 Md. 368, (2009) (a case in which the doctrine was applied to closing arguments, stating:

> We have held that the opened door doctrine applies in the context of opening statements, see *Terry v. State*, 332 Md. 329, 337, 631 A.2d 424, 428 (1993) (noting that, although the opening statement is not evidence, "the general principles involved in allowing a party to 'meet fire with fire' are applicable"), and we see no reason why it should not apply in the context of closing arguments as well.).

In our view, appellant's counsel "opened the door" for the prosecutor to provide an explanation as to why C.G.'s video recording was not produced. By stating, "What are they hiding? What are they hiding?[,]" appellant's counsel implied that although the video recordings of wife and appellant were produced, the prosecutor did not introduce C.G.'s recorded interview into evidence because there was something to hide from the jury. In light of such remarks, the prosecutor's rebuttal generally explaining impeachment, past recollection recorded, and statements against self-interest, was a fair response. Thus, we conclude such remarks did not shift the burden.

Vouching

Appellant claims statements made by the prosecutor about the lack of impeachment evidence "impermissibly vouched for the credibility of the witness." According to him, the State argued that the witness should be believed because the defense did not produce any evidence to impeach her credibility. As mentioned above, the State contends this argument was made in response to appellant's mention of C.G.'s recorded interview with the police.

Vouching occurs when the prosecution "place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. 145,153 (2005) (quoting *U.S. v. Daas*, 198 F.3d 1167, 1178 (9th Cir.1999)). "The rule against vouching does not preclude a prosecutor from addressing the credibility of witnesses in its closing argument." *Sivells v. State*, 196 Md. App. 254, 278 (2010). "Where a prosecutor argues that a witness is being truthful based on the testimony given at trial,

and does not assure the jury that the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching." *Spain*, 386 Md. at 155 (*see*, e.g., *U.S. v. Walker*, 155 F.3d 180, 187 (3rd Cir.1998)).

Here the prosecutor, while explaining why C.G.'s video was inadmissible, simply stated if C.G. had testified to something other than what was stated in the video, the defense could have used the video to impeach her. These statements did not constitute vouching nor were they improper. Assuming arguendo, the statements were improper, we conclude that the court's reinstructions to the jury that the statements made during closing arguments were not evidence but were to help the jury "understand the evidence and apply the law" were sufficient to alleviate any potential prejudice.

Stating the Law

Appellant argues that the State during its rebuttal "impermissibly argue[d] the admissibility of evidence to the jury." Specifically, appellant contends "the State argue[d] the meaning of impeachment evidence, statements against self-interest, and past recorded recollection recorded," claiming it is "impermissible to argue any law other than the jury instructions during closing arguments."

We are not persuaded the State impermissibly argued the law. Rather, the prosecutor pointed out why certain evidence was admissible and corrected appellant's counsel's misrepresentation that there was something to hide on C.R.'s video recording, while noting it was inadmissible hearsay. Further, following closing argument, the judge provided the jury with proper instructions.

IV. There was sufficient evidence to convict the appellant of third-degree sex offense and child abuse.

Appellant argues there was insufficient evidence to convict him because no one testified that appellant committed or admitted to inappropriate acts occurring on any of the dates or time frames charged in the indictment and C.G. did not describe intercourse when testifying about the September incident. The State contends there was sufficient evidence to convict the appellant. We agree.

When reviewing insufficiency of evidence claims, this Court is to determine, "after viewing the evidence in the light most favorable to the prosecution, [whether] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Titus v. State*, 423 Md. 548, 557 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Fuentes v. State*, 454 Md. 296, 308 (2017) (citing *State v. Smith*, 374 Md. at 557, 823 (2011)).

Sexual abuse of a minor is prohibited under the Maryland Code, which states, "A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." Md. Code Ann., Crim. Law § 3-602(b)(1) (2018). Sexual abuse includes:

1. incest;
2. rape;
3. sexual offense in any degree;
4. sodomy; and

5. unnatural or perverted sexual practices.

Id.

Section 3-307 defines third-degree sexual offense and states a person may not:

> (4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or
>
> (5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

Md. Code Ann., Crim. Law § 3-307 (2018).

In 2013, at the time of the first offense, C.G. was 14 years of age. While she testified that "two or three days before" her birthday in September 2013, appellant had sexual intercourse with her at appellant's home, she also stated that appellant had "sexual contact" with her about "two or three times" in a week. When asked if "any of those memories" stood out to her, C.G. responded saying "around November." When questioned about October 31, 2013, C.G. indicated that the appellant "fingered [her]" meaning he "inserted his fingers in [her] vagina."

Appellant contends the State did not establish during trial that sexual relations occurred between him and C.G. on dates in the indictment, therefore his charges should not be upheld. However, it is well established that "because the date of an offense generally is not an element of the offense, a variance between the time period alleged in the indictment and the proof at trial is not fatal to a conviction." *Reece v. State*, 220 Md. App. 309, 333 (2014). In *Crispino v. State*, the court reasoned:

> With respect to a variance from the time period alleged and that adduced at trial, we have stated that the time period proven need not coincide with the

> dates alleged in the charging document, so long as the evidence demonstrates that the offense was committed prior to the return of the indictment and within the period of limitations.

417 Md. 31, 51–52 (2010).

V. The court did not err in admitting Pastor Chase's testimony about the conversation she had with the appellant.

Appellant contends the court violated the penitent privilege by allowing Pastor Chase to testify about her conversation with the appellant. Appellant states "[a]t all times [Pastor Chase] was acting in her capacity as his pastor" and because of that, the conversation is covered under the privilege. The State argues the conversation is not covered under the penitent privilege because appellant "was not seeking 'spiritual advice or consolation[,]' during the relevant conversation." The State further contends that if the penitent privilege were to apply "Family Law Article § 5-705 creates a child abuse exception to the penitent privilege."

The Maryland Code states:

> A minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation.

Md. Code Ann., Cts. & Jud. Proc. § 9-111 (2018).

Here, appellant was not seeking to make a confession or confide in Pastor Chase for "spiritual advice or consolation." Cts. & Jud. Proc. § 9-111. Instead Pastor Chase, after speaking with C.G., confronted appellant with the allegations. At no point did appellant indicate he was seeking spiritual guidance nor was any guidance offered.

Further, under Md. Code Ann., Fam. Law § 5-705 (2018), appellant would

have no privilege as the pastor was in a category of persons who are required to disclose. Section 5-705 provides, in pertinent part:

> (a)(1) Except as provided in paragraphs (2) and (3) of this subsection, notwithstanding any other provision of law, including a law on privileged communications, a person in this State other than a health practitioner, police officer, or educator or human service worker who has reason to believe that a child has been subjected to abuse or neglect shall notify the local department or the appropriate law enforcement agency.
>
> (3) A minister of the gospel, clergyman, or priest of an established church of any denomination is not required to provide notice under paragraph (1) of this subsection if the notice would disclose matter in relation to any communication described in § 9-111 of the Courts Article and:
>
> (i) the communication was made to the minister, clergyman, or priest in a professional character in the course of discipline enjoined by the church to which the minister, clergyman, or priest belongs; and
>
> (ii) the minister, clergyman, or priest is bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice.

Md. Code Ann., Fam. Law § 5-705 (2018).

In sum, the privilege simply does not apply and even if it did, the exception made Pastor Chase's testimony admissible.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.