UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0483

September Term, 2014

MIGUEL A. FUENTES

v.

STATE OF MARYLAND

Woodward,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 18, 2016

Tried by a jury in the Circuit Court for Prince George's County, appellant, Miguel A. Fuentes, was convicted of second-degree rape and third-degree sexual offense.[1] The trial court sentenced Fuentes to a total of 20 years in prison, suspending all but 12 years, after which he timely noted this appeal.

Fuentes presents the following questions for our consideration:

1. Was the evidence legally insufficient to support Appellant's convictions where the State failed to prove the alleged victim's mental deficiency?

2. Did the trial court err in allowing the State to make improper and prejudicial statements at closing argument?

3. Did the trial court err in excluding evidence relevant to the alleged victim's mental capabilities?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

Elizabeth R.,[2] aged 38 at the time of trial and deaf, testified through three interpreters[3] that in February 2012, when she was folding clothing and linens in a closet at

[1] The jury acquitted Fuentes of fourth-degree sexual offense and second-degree assault.

[2] To protect the privacy of the sexual assault victim, we will use only the first initial of her and her family members' surnames.

[3] Ms. R. was assisted by an American Sign Language interpreter, a "certified deaf interpreter," and a Spanish interpreter who interpreted for the deaf interpreter (Ms. R. was born in El Salvador and Spanish is her first language). The interpreters had difficulty understanding the witness, and our review of the trial transcripts reveals that Ms. R. appeared to have trouble understanding and answering the questions posed to her. For example, when she was asked how old she was, Ms. R. answered, "Yes, I'm 15. Thirty-six, 22, I'm 22. I'm 30." And, when asked if she knew when her birthday was, she answered, "I was banging on my stomach and they cut me."

work at the Adelphi, Maryland, Marriott hotel, "Miguel" came up behind her, touched her "behind," and put his hand over her mouth. Miguel then opened his zipper and pulled down her pants and underwear. Frightened, she told him to go away and repeatedly said, "No," but he put his penis into her vagina.[4] Afterwards, in pain, she wanted to go to the bathroom, but Miguel would not let her go. When Miguel left the closet, Ms. R. went to the bathroom and was surprised to find something red—either "[b]lood, urine, or water"—coming out of "the lower of [her] body."

During trial, Ms. R. shrugged when the prosecutor asked if she saw Miguel in the courtroom, but she identified Fuentes as "Miguel" from a photograph the State introduced into evidence.

Ms. R.'s mother, Maria M., characterized her daughter as "disabled" and stated that Ms. R. had gone to a high school for "students with disabilities," from which she graduated in 1998. Ms. M. testified that Ms. R. can never be left alone and is not able to go to work by herself, cannot cook, and does not wake herself up, communicate well, or go to the store. Nonetheless, Ms. R. maintained her job in the housekeeping department at the Marriott for 14 ½ years.

In February 2012, Ms. M. noticed her daughter crying and shaking on several occasions, but she initially attributed it to the death of her husband, Ms. R.'s stepfather, earlier that month. By May 2012, however, she noticed that Ms. R. appeared to be gaining weight; a June 2012 blood test revealed that Ms. R. was pregnant. When Ms. M. asked

[4] Ms. R. later made use of anatomically correct dolls to show the jury what Miguel had done to her.

who had impregnated her, Ms. R. wrote "Miguel," whom Ms. M. knew as a Marriott employee through her own former employment as a cook at the hotel (she was laid off in 2010). As Ms. R. had never complained about Fuentes touching her inappropriately, Ms. M. was shocked by the revelation. She notified the Marriott administration and the State's Attorney's Office, and the police interviewed Ms. R. in June 2012.

Ms. R. gave birth to a daughter, Helen, on November 29, 2012. Through DNA samples obtained from Ms. R., Helen, and Fuentes, the State's expert DNA analyst determined that there was a 99.9999996% probability that Fuentes was the father of Ms. R.'s baby.

Ms. R.'s sister, Sonia R., testified that she and her children live with Ms. R., their mother Ms. M., and Helen. She stated that Ms. R. is never left alone in the home and requires supervision and assistance at all times because she cannot take care of herself. Sonia R. is able to communicate with Ms. R. through signs the siblings developed as children (neither of them knows much American Sign Language), and she usually understands her sister, but Sonia R. occasionally has to repeat herself for Ms. R. to comprehend what she is saying.

In March 2012, Sonia R. said, Ms. R. was jumpy and "frightened about everything," but she had not been like that prior to February 2012. Although Ms. R. expressed anguish that her stepfather had passed away, she did not tell her sister that anything upsetting had happened with Miguel.

Bonnie Bland, also deaf, a case manager/job coach for Humana, an organization that "helps people with disabilities," testified that she had worked with Ms. R. since 2006 to

help her improve her skills in an attempt to increase her independence.[5] She stated that Ms. R. has "so many disabilities" and such limited language that her ability to work is limited. Although Ms. R. uses "broken English signs" to communicate, Ms. Bland is able to understand her.

Prince George's County Police Detective Nicholas Collins interviewed Ms. R. on June 14, 2012, with the assistance of a sign language interpreter. He testified that she had difficulty in understanding and responding to his questions, but after about five minutes, she was able to explain that the man who raped her had bent her over a chair and locked the door. The detective noted that the "victim was unable to articulate any aspect of force" because of her inability to communicate, but he disagreed that she had indicated that no force was exerted.

At the close of the State's case-in-chief, Fuentes moved for judgment of acquittal, arguing that the State had adduced no evidence regarding Ms. R.'s state of mind or mental defect and that the lack of competent scientific evidence precluded a finding that she was a person with a mental defect so as to negate her ability to consent to sexual contact under the pertinent statutes. Her inability to communicate, he continued, should not be attributed to a mental defect but to the fact that she had never properly been taught American Sign Language or English or Spanish. In addition, there was no evidence that Fuentes knew or

[5] When Ms. Bland characterized Ms. R. as suffering from "mental retardation," the trial court sustained defense counsel's objection. Ms. Bland later clarified that she is not a psychologist or medical professional.

should have known that Ms. R. suffered from a mental defect. Finding sufficient evidence on the part of the State to make a *prima facie* case, the court denied the motion.

In his defense, Fuentes presented the testimony of three co-workers from the Marriott, Eleticia Hernandez, Roxana Martinez, and his daughter, Liliana Fuentes. The women agreed that Fuentes and Ms. R. had worked in close proximity to each other and that the two were friends, with Ms. R. occasionally trying to follow and touch Fuentes. Each of the women said she was able to communicate with Ms. R., either through gestures or drawings. Liliana Fuentes conceded that she had never known Ms. R. to lie.

Fuentes testified that he and Ms. R. had worked together, with him teaching her her job duties when she first started working in the "dish room" at the Marriott. Although he did not sign, he eventually learned to understand Ms. R.'s signals and was able to communicate with her most of the time.

When Ms. R. was transferred to housekeeping, he saw her often because they used the same elevator, and they became friends. On numerous occasions, he found Ms. R. looking for him outside of her own work area. They also had lunch together several times; although he did not invite her to eat with him, she would follow him to his table.

Fuentes conceded that he and Ms. R. had sexual intercourse on the fourth floor of the Marriott in February 2012 but denied that he had touched her inappropriately or forced her to have sex. In fact, he said, Ms. R. had touched his penis many times, making him nervous, and he had told her to stop; he also informed her mother, but Ms. M. did nothing to stop the behavior.

Fuentes testified that on the day in question, Ms. R. indicated to him that she needed help on the fourth floor of the hotel. When they arrived on that floor, she motioned that he should go into the linen closet and sit on a chair. She made a gesture that he took as approval for having sex, and she then sat on top of him. She eventually took off her pants and underwear and opened his zipper to expose his penis and "put it inside her." She could have gotten up at any time, he insisted, and she never told him to stop.

After the encounter, Ms. R. put her clothes back on and left the closet. When Fuentes saw Ms. R. again later that day she appeared to be happy. He admitted to one other consensual sexual encounter with Ms. R., in March 2012.

At the close of all the evidence, Fuentes renewed his motion for judgment of acquittal, arguing that no evidence had been presented that he knew or should have known that the victim had any mental defect that would negate her consent. In addition, he argued that evidence had been presented of her consent, despite her inability to speak. The court again denied the motion.

DISCUSSION

I.

Fuentes first argues that the evidence adduced at trial was insufficient to sustain his convictions of second-degree rape and third-degree sexual offense because the State failed to prove that Ms. R. was mentally defective—and thus legally incapable of consenting to sexual intercourse or sexual contact—as required by the applicable statutes when the jury's acquittal of him on the charges of second-degree assault and fourth-degree sexual offense showed it had found that he had employed no force or threat of force. In the absence of

any medical or scientific proof, expert testimony, or competent lay testimony that Ms. R. had been diagnosed with mental retardation or a specific mental disorder, he concludes, no reasonable juror could have determined that Ms. R. was a person with a mental defect.

The State counters that the plain language of the applicable statutes gives no indication that medical or scientific evidence is required to prove that an alleged rape or sexual assault victim is mentally defective so as to negate her legal capability to consent to sexual intercourse.[6] Therefore, the State concludes, it was properly left to the jury to determine from the evidence presented at trial whether Ms. R. was mentally defective.

In reviewing an appellate challenge to the sufficiency of the evidence,

> '[w]e examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In so doing, it is not our role to retry the case. Rather, because the fact-finder possesses the unique opportunity to view the evidence . . ., we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to any possible reasonable inferences the [finder of fact] could have drawn from the admitted evidence and need not decide whether the [finder of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.'

Schmitt v. State, 210 Md. App. 488, 495-96 (quoting *State v. Mayers,* 417 Md. 449, 466 (2010)).

[6] The State also raises a preservation issue, arguing that Fuentes's argument during his motions for judgment of acquittal differs from the one presented on appeal. We are satisfied, however, that the argument made before the trial court sufficiently permitted that court to consider the issue Fuentes raises in this appeal.

Second-degree rape is defined by Section 3–304(a) of the Criminal Law Article ("CR"), which in pertinent part, provides:

> (a) *Prohibited*.—A person may not engage in vaginal intercourse with another:
>
> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual[.]
>
> * * *
>
> (c) *Penalty*.—(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section is guilty of the felony of rape in the second degree and on conviction is subject to imprisonment for not exceeding 20 years.

CR § 3-304. When second-degree rape involving a legally incompetent victim is charged pursuant to CR §3-304(a)(2), "lack of consent does not have to be established independently by showing either resistance or fear of resistance but is automatically established, as a matter of law, by the status of the victim." *Travis v. State*, 218 Md. App. 410, 428-29 (2014).

Third-degree sexual offense is proscribed by CR §3-307:

> (a) *Prohibited*.—A person may not:
>
> (1) (i) engage in sexual contact with another without the consent of the other; and

(ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or

4. commit the crime while aided and abetted by another;

(2) engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual [.]

* * *

(b) *Penalty*.—A person who violates this section is guilty of the felony of sexual offense in the third degree and on conviction is subject to imprisonment not exceeding 10 years.

Finally, CR §3-301 defines "mentally defective individual:"

(a) *In general*.—In this subtitle the following words have the meanings indicated.

(b) *Mentally defective individual*.—"Mentally defective individual" means an individual who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of:

(1) appraising the nature of the individual's conduct;

(2) resisting vaginal intercourse, a sexual act, or sexual contact; or

(3) communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact.[7]

To sustain a conviction of second-degree rape under CR §3-304(a) (2), the State was required to prove beyond a reasonable doubt that: (1) Fuentes had vaginal intercourse with Ms. R.; (2) Ms. R. was mentally defective, mentally incapacitated, or physically helpless, and; (3) Fuentes knew or reasonably should have known that Ms. R. was mentally defective, mentally incapacitated, or physically helpless. And, to sustain a conviction of the crime of third-degree sexual offense under CR §3-307(a) (2), the State was required to prove beyond a reasonable doubt that: (1) Fuentes engaged in sexual contact with Ms. R.; (2) Ms. R. was mentally defective, mentally incapacitated, or physically helpless, and; (3) Fuentes knew or reasonably should have known that Ms. R. was mentally defective, mentally incapacitated, or physically helpless.

There is no dispute that Fuentes had vaginal intercourse with Ms. R. and engaged in sexual contact with her. The only issue is whether the evidence was sufficient to prove that Ms. R. satisfied the definition of "mentally defective," and, if so, whether Fuentes knew or should have known of her mental defect.[8]

[7] Effective October 1, 2016, the criminal law statutes relating to certain sexual offenses will change references to the term "mentally defective" to "substantially cognitively impaired." In addition, the new definition will change the term "mental retardation" to "intellectual disability." The changes are to reflect more enlightened societal views, are considered stylistic, and will not alter substantially the definition of the current term "mentally defective individual." *See* 2016 Maryland Laws, Ch. 633 (H.B. 822).

[8] Fuentes does not specifically argue that the evidence was insufficient to prove second-degree rape by force or threat of force without Ms. R.'s consent, under CR §3-404(a) (1). Instead, he contends that the jury's acquittal of the charges of (continued…)

Fuentes's main argument is that the legal determination of whether one satisfies the definition of "mentally defective" requires medical evidence or expert testimony. In his view, absent any medical evidence that Ms. R. was medically diagnosed with mental retardation or a mental disorder, the jury could not find that she is mentally defective. We disagree.

CR §3-304(a)(2) prohibits one from undertaking vaginal intercourse with another who is mentally defective, mentally incapacitated, or physically helpless. The term "mentally defective individual" is defined by CR §3-301(b). Although the General Assembly specifically defined the term, absent from the definition is any requirement that such mental defect be declared or proven by medical or expert testimony, although we have no doubt the General Assembly could have imposed such a requirement if it had chosen to do so.[9]

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second-degree assault and fourth-degree sexual offense "clearly indicates that his conviction for rape was based on the jury's determination that Ms. R. was a 'mentally defective individual.'"

Although that indication is perhaps not so clear as Fuentes suggests, the jury's verdict would appear to support that interpretation, as second-degree assault would necessarily be a lesser included crime of second-degree rape of the force or threat of force modality. *See Travis*, 218 Md. App. at 418; *Thompson v. State*, 119 Md. App. 606, 608 (1998). As such, we do not consider the sufficiency of the evidence to prove second-degree rape by force or threat of force. And, as the jury was instructed solely on the mentally defective modality of third-degree sexual offense, we similarly do not consider the sufficiency of the evidence to prove that crime by lack of Ms. R.'s consent.

[9] Because the General Assembly, in CR §3-301, did not adopt the definition of the term "mental disorder" as set forth in the Health General or Criminal Procedure Articles, we reject Fuentes's suggestion that we import the definition from one or both of those Articles, each of which limits the use of the definition to that portion of the Code. *See* Md. Code (2001, 2008 Repl. Vol.), §3-101 of the Criminal Procedure Article (continued…)

In addition, the Maryland Pattern Jury Instruction-Criminal ("MPJI-Cr.") on second-degree rape, MPJI-Cr. 4:29.3A, which Fuentes does not challenge, similarly relates to the jury what evidence the State must adduce to prove that the victim was mentally defective.[10] The jury is not instructed that any specific type of evidence—medical, expert, or lay—is required for it to make a finding that the victim is mentally defective and therefore unable to consent to vaginal intercourse.

("In this title the following words have the meanings indicated."); Md. Code (1982, 2009 Repl. Vol.), §10-101 of the Health General Article (same).

[10] MPJI-Cr 4:29.3A reads, in pertinent part:

> The defendant is charged with the crime of second degree rape. In order to convict the defendant of second degree rape, the State must prove:
>
> (1) that the defendant had vaginal intercourse with (name);
> (2) that (name) was [mentally defective] [mentally incapacitated] [physically helpless] at the time of the act; and
> (3) that the defendant knew or reasonably should have known of the condition of (name).
>
> Vaginal intercourse means the penetration of the penis into the vagina. The slightest penetration is sufficient and emission of semen is not required.
>
> [A person is mentally defective if [he] [she] is mentally retarded or suffers from a mental disorder and is substantially unable (1) to understand the nature of [his] [her] conduct, or (2) to resist an act of vaginal intercourse, or (3) to communicate that [he] [she] does not want to participate in an act of vaginal intercourse.]

MPJI-Cr. 4:29:8A uses the same definition of "mentally defective" with regard to third-degree sexual offense.

One purpose of the second-degree rape modality that prohibits sexual intercourse with a mentally defective, mentally incapacitated, or physically helpless individual is to obviate the need for independent proof of lack of consent by establishing it automatically through the status of the victim. *Travis*, 218 Md. App. at 428-29. A requirement of expert or medical testimony, when the jury is able to observe the victim and make its own determination of his or her mental capacity, would add to the victim's burden of proof, not reduce it. Moreover, by way of comparison, there is no requirement of medical testimony, under CR §3-301(c), to prove that a victim was mentally incapacitated during intercourse because of "the influence of a drug, narcotic, or intoxicating substance," nor do we think there should be.

As we always point out in an appellate challenge to the sufficiency of the evidence, the proper analysis is whether *any* rational juror could have found the essential elements of the crime beyond a reasonable doubt. In this matter, although no medical evidence or expert testimony was adduced to prove that Ms. R. suffers from a mental defect, the jury was able to observe Ms. R.—who required the assistance of three interpreters, had trouble understanding and answering questions, and often mimicked the signs of the interpreters instead of responding to their questions—and assess her mental capacity. In addition, the jury heard the following testimony that arguably supported its finding that Ms. R. is mentally defective within the definition of CR §3-301:

> (1) Ms. R.'s apparent inability to understand or answer the most basic of questions, including those inquiring of her own birth date and age, even with the assistance of several interpreters;

> (2) Her confusion about the red liquid she said came out of the "lower of [her] body" after the rape, and her belief that it may have been water or urine;
>
> (3) Her mother's testimony that Ms. R. is "disabled" and went to a school for children with disabilities;
>
> (4) Her mother's and sister's testimony that she can do nothing for herself or her daughter and cannot be left alone for any period of time;
>
> (5) Her inability to understand and respond to Detective Collins' questions about the rape, even with the assistance of an interpreter;
>
> (7) Ms. Bland's testimony that she works for an organization that assists disabled individuals and that Ms. R. has "so many disabilities" and such limited language that it is very difficult for her to find work.

In our view, given the particular circumstances of this matter, that is, the apparently severe nature of Ms. R.'s disabilities and diminished capacity, the jury was reasonably able to infer that Ms. R. suffers from a mental defect sufficient to preclude the need to prove independently her lack of consent to sexual intercourse and sexual contact under CR §§ 3-304 and 3-307, even in the absence of medical evidence or expert testimony. Similarly, the jury reasonably could have inferred that Fuentes knew or should have known of her mental defect, given their 14-year work relationship. As such, the evidence was sufficient to prove the crimes of second-degree rape and third-degree sexual offense.

II.

Fuentes next contends that the trial court erred in permitting the State to make improper and prejudicial comments regarding his purported knowledge of Ms. R.'s alleged mental defect during its rebuttal closing argument. The State's comments, he avers, related

to facts not in evidence because he never acknowledged Ms. R.'s diminished mental state, and "the resulting prejudice of such an allegation was astronomical," as the State was required to prove he knew or should have known that Ms. R. was mentally defective.

During his closing argument, defense counsel denied that the State had proved that Ms. R. is mentally defective, as no medical evidence had been adduced to show such defect, and he argued that Fuentes therefore did not know, nor could he reasonably have known, of any such mental defect. During her rebuttal closing argument, the prosecutor referred to an interview undertaken by Marriott security staff on June 7, 2012, after Ms. M. reported the alleged rape of her daughter:

> [PROSECUTOR]: … He [DEFENSE COUNSEL] will also have you believe that the defendant doesn't speak enough English, and so when he was interviewed on June 7th by the Marriott security, he didn't understand and they made him sign it, and so when he said that he took advantage of her mental diminished mental capacity [sic]---
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Can we approach?
>
> THE COURT: Sure.
>
> (Whereupon, counsel approached the bench and the following ensued.)
>
> [DEFENSE COUNSEL]: Your Honor, that's not in evidence. That's not in evidence, one, and anywhere mentioned in the question that was attempted to have been asked regarding his mental—his understanding of her mental capacity was objected to and Your Honor sustained the objection.
>
> [PROSECUTOR]: He testified—when I asked him about it, he said that he didn't understand what was given to him, that he doesn't understand English, that they made him sign it. I asked him.

> [DEFENSE COUNSEL]: Correct.
>
> [PROSECUTOR]: And I'm only saying as to what the actual statement said. Not whether he understood whether he thought she had mental capacity issues.
>
> [DEFENSE COUNSEL]: That information that was elicited regarding any sort of mental understanding on his part, anything that was written in the statement did not come into evidence. That was not—that question was not asked of my client. It was not asked whether he understood what those letters meant, that information did not come because it was objected to.
>
> [PROSECUTOR]: I specifically asked it and actually read from it. And then he said, he answered, he said, Oh, they just gave it to me. I didn't know what was said in it. They just told me to sign it.
>
> THE COURT: I'm going to overrule it, but I'm going to instruct the jury that they are to rely on their own memory of the evidence.
>
> [PROSECUTOR]: Thank you.
>
> [DEFENSE COUNSEL]: Thank you.[11]

The argument referred to Fuentes's interview by Marriott security personnel on June 7, 2012. The prosecutor cross-examined Fuentes about that interview:

> Q. Okay. And you realized working with her that she had diminished capacity, correct?
>
> A. Because she wouldn't talk and she could not hear.
>
> Q. But you also knew that she had issues with comprehension, correct?

[11] Indeed, the court shortly thereafter instructed the jury: "But I will remind you that you have your notes and your memory. And if your memory from the evidence differs from anything that I or the lawyers may say, you must rely on your own memory."

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Approach the bench.

(Whereupon, counsel approached the bench and the following ensued.)

[DEFENSE COUNSEL]: There's been no evidence about—there's been no testimony provided from anybody else that's been the overriding issue in this case; that there is no expert witness and expert testimony regarding the victim's mental capacity or incapacity, for that matter. I think the questions that are being asked of my client are highly prejudicial and the impact that could have on the jury, that was the basis for my objection.

THE COURT: I think some form of your question is appropriate. If I hear another question that's more appropriate, I'll overrule.

[DEFENSE COUNSEL]: Thank you, Your Honor.

(Whereupon, counsel returned to the trial tables and proceedings resumed in open court.)

Q. When you were training her, you had to go over things more than once, correct?

A. Yes.

Q. And they were basic things she had to do, correct?

A. Yes.

Q. And there was a lot of things [sic] she didn't understand, correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

BY [PROSECUTOR]:

Q. Did she understand everything—did she seem to understand everything you were saying to her?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

BY [PROSECUTOR]:

A. Yes, she did. She understood.

Q. She understood everything you would say, correct?

A. Not everything but most of the things.

Q. And on June 7, 2012, you were interviewed by Alex Roche from Marriott?

A. Yes.

Q. And you told him that you acknowledge and stated that you took advantage of [Ms. R.] considering her mental state and diminished capacity, correct?

A. No.

Q. You did not say that?

A. No.

Q. Do you remember being interviewed?

A. Approximately—it's been two years and I don't—and there was no interpreter there and I don't remember very well.

Q. And in that interview, you said that you had sex with [Ms. R.] twice, once in February and once in March, correct?

A. Yes.

> Q. And she made a gesture to you which you took as approval for having sex with her, correct?
>
> A. Yes, she did.
>
> Q. And you said that she did something with her hands, with a poking, pointing, and then she pointed at her vagina, correct?
>
> A. Yes.
>
> Q. Okay. And you never said anything about her putting you on a chair, correct?
>
> A. She told me for me [sic] to sit first.
>
> Q. That's not my question. My question is: When you talked to Marriott back in June when they told you that she was accusing you of raping her, you never told them that she told you to sit down on the chair or even pushed you on the chair or anything about the chair, correct?
>
> A. Yes, that's correct.
>
> Q. Okay, and then—
>
> A. Excuse me. The officers that arrived there had told me—
>
> [PROSECUTOR]: Objection. I mean—sorry, Your Honor. As to anything that anyone else told him.
>
> THE COURT: Okay. Sustained.
>
> [PROSECUTOR]: And it's non-responsive. I have nothing further for this witness.

Upon re-direct examination, Fuentes stated that the document comprising his statement to Marriott security was written in English and given to him, so he signed it, notwithstanding the fact that he does not read English and did not know what was written

on the document. The statement itself, marked for identification as defense exhibit number six, was not entered into evidence.

Fuentes now claims that the prosecutor's comments during rebuttal closing argument were improper because they referred to facts not in evidence and that he suffered unfair prejudice as a result. We agree with Fuentes that the court erred in permitting the prosecutor to comment on facts not in evidence, but we conclude that the error was harmless beyond a reasonable doubt.

In her rebuttal closing argument, the prosecutor stated that Fuentes, during his June 7, 2012 interview, acknowledged to Marriott security staff that he had taken advantage of Ms. R.'s diminished mental capacity. Fuentes's trial testimony, however, belies that assertion, and the written statement itself was not admitted into evidence.

In fact, when the prosecutor asked Fuentes, upon cross-examination, if he told the Marriott interviewer that "you acknowledge and stated that you took advantage of Elizabeth R[.] considering her mental state and diminished capacity," Fuentes answered, "No." Therefore, the prosecutor's argument to the court upon defense counsel's objection to her rebuttal closing argument, that "I'm only saying as to what the actual statement said," is unsupported by the record, and the trial court's failure to sustain Fuentes's objection was erroneous.

A finding of error does not, however, end our inquiry. Error in closing argument is subject to harmless error review. *Jones v. State*, 217 Md. App. 676, 694, *cert. denied*, 440 Md. 227 (2014). In determining whether the trial court's decision to overrule defense objections to improper statements during closing argument constitutes reversible, or

harmless, error, we consider the following three factors: (1) the weight of the evidence against the defendant, because a strong case against him lessens the likelihood that the improper remark caused prejudice; (2) the severity of the remarks, cumulatively; and (3) any curative measures taken by the trial court. *Id*.

Here, the State's case was not weak, but it hinged primarily on witness testimony, specifically whether the jury viewed Ms. R.'s account of the sexual encounter as more credible than that of Fuentes. Although Ms. R.'s testimony, if believed by the jury, was sufficient to support the jury's guilty verdict, her claim of rape was strongly disputed by Fuentes, who claimed the intercourse was initiated by Ms. R. and consensual. *See Donaldson v. State,* 416 Md. 467, 499–500 (2010) (when the "entire defense centered on the ... credibility [of the State's witnesses] and the accuracy of their testimony," and when the evidence was strongly disputed, an appellate court could not conclude that the evidence "was so overwhelming that the prosecutor's improper statements could not have influenced the jury's verdict."). This factor weighs in favor of a finding of prejudice. *Jones*, 217 Md. App. at 695.

In considering the nature and severity of the prosecutor's comments, we look to whether there was one isolated remark or multiple improper remarks and whether the remarks related to an issue that was central to a determination of the case or a peripheral issue. *Id.* at 695-96. Here, the prosecutor made only one improper remark, but we have held that the credibility of the sole witnesses to the event giving rise to the defendant's conviction is considered a critical issue in the case, and an improper remark's relevance to a critical issue increases its prejudicial effect. *Id*. at 696-97 (citing *Sivells v. State,* 196 Md.

App. 254, 290-91 (2010)). In such instances, we generally have held that the factor weighs neutrally or slightly in the defendant's favor. *Id*. at 697.

However, the prosecutor's remark, although referring to facts not in evidence when stating that Fuentes mentioned *in his interview with Marriott security* that he acknowledged Ms. R.'s diminished capacity, was not particularly harmful in light of Fuentes's trial testimony; when asked by the prosecutor, upon cross-examination, whether he realized, working with Ms. R., that she had diminished capacity, he answered, "Because she wouldn't talk and she could not hear." Although, as the State acknowledges in its brief, Fuentes's answer is open to more than one interpretation, the absence of a denial of his realization of her diminished capacity and the long history of his working relationship with her supports a finding that he surely was aware of her diminished capacity. As such, the prosecutor's error was more one of inaccuracy than unfair prejudice.

Finally, in our determination whether the prosecutor's remark misled or was likely to have misled the jury to Fuentes's prejudice, we look to whether the trial court took any contemporaneous and specific curative action that made the jury understand the remarks were not evidence to be considered in reaching a verdict. *Id*. Here, the trial court instructed the jury, at the close of the State's rebuttal closing argument, that "you have your notes and your memory. And if your memory from the evidence differs from anything that I or the lawyers may say, you must rely on your own memory." Our courts consistently "have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary." *Spain v. State,* 386 Md. 145, 160 (2005).

Taking all the circumstances into account, we conclude that the prosecutor's single improper remark was unlikely to have influenced the jury to Fuentes's unfair prejudice. Therefore, we deem the error harmless beyond a reasonable doubt.

III.

Finally, appellant avers that the trial court erred when it declined to admit into evidence, on grounds of relevance, over 300 pages of Ms. R.'s employment records from the Marriott, which included performance evaluations dating back to 1998, as they supported a finding of her ability to maintain employment and perform her job duties independently. The records showing this ability, he concludes, contradicted the State's claim that she suffered from a mental defect.

Whether a trial court admits or declines to admit evidence is a decision that is given great deference by appellate courts, and such a decision is reversed only if the lower court abused its discretion. *Kelly v. State*, 392 Md. 511, 530 (2006) (citing *Hopkins v. State*, 352 Md. 146, 158 (1998)). A ruling reviewed under the abuse of discretion standard will not be reversed unless the decision was "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *DeLeon v. State,* 407 Md. 16, 21 (2008) (quoting *Evans v. State,* 396 Md. 256, 277 (2006)). We see no such abuse of discretion here.

In general, irrelevant evidence is not admissible. Maryland Rule 5-402. "Relevant evidence" is defined by Md. Rule 5-401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." A determination of whether evidence is relevant is a matter of law. *DeLeon*, 407 Md. at 20.

In our view, Ms. R.'s employment records were not relevant to a determination of whether she suffered from a mental defect that would render her legally incapable of consenting to sexual intercourse or sexual contact. There was no dispute that she was employed by the Marriott for over 14 years or that she performed her housekeeping duties capably. An ability to perform her job, however, does not support a finding that she did not suffer from a mental defect, as defined by the pertinent statutes. Therefore, the employment records would not have made it more or less probable that she met the legal definition of a mentally defective individual. As such, the trial court did not abuse its discretion in declining to admit them.

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