UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 198

September Term, 2014 Term

TIMOTHY MARSHALL BALLARD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 19, 2015

On November 7, 2013, following a three-day jury trial in the Circuit Court for Montgomery County, Timothy Marshall Ballard, the appellant, was convicted on one count of child sex abuse. The court sentenced him to 25 years in prison, all but 18 months suspended, to be followed by five years of supervised probation.

The appellant raises five questions for consideration, which we have simplified as follows:

I. Did the trial court err by admitting evidence of the victim's demeanor when he disclosed the sexual abuse?

II. Did the trial court err by preventing the defense from introducing into evidence a previously undisclosed photograph of the appellant?

III. Did the trial court err by allowing a detective to testify regarding how well child witnesses remember dates?

IV. Did the trial court commit plain error by failing to stop the prosecutor from making repeated, improper comments during closing argument and rebuttal closing argument?

V. Did the trial court abuse its discretion by denying his motion for new trial?

Discerning no reversible error or abuse of discretion, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

The appellant is a voice teacher who gave private and semi-private voice lessons in his home. The victim, Ethan B.,[1] began taking voice lessons with the appellant in 2006 or 2007. The appellant became close friends with Ethan and his family, socializing with

[1]To protect the privacy of the victim and his family, we shall refer to the victim and his family members by their first names and last initial.

Ethan's father, John B., and spending holidays with Ethan's family. At the time of the appellant's trial in November of 2013, Ethan was 18 years old.

In the summer of 2012, Ethan disclosed to friends that the appellant had sexually abused him on several occasions. According to Ethan, the appellant showed him pictures of erect penises twice; offered him alcohol; asked him to take a picture of his penis and show it to him; performed fellatio on him twice; and, while lounging on his couch, unzipped his pants and placed Ethan's hand on his erect penis. Ethan later disclosed the abuse to his parents. Ethan's mother called a hotline run by the Montgomery County Department of Health and Human Services ("DHHS"), and the next morning they took Ethan in for an appointment. After speaking with Ethan, DHHS representatives called the police.

The appellant denied ever acting inappropriately with Ethan. He claimed that he and Ethan had fought because the appellant wanted Ethan to pursue singing lessons, but Ethan wanted to focus on dance. The appellant also suggested that Ethan was angry with him because he had embarrassed him by scolding him in front of other students during a recital rehearsal and because he had confronted him about engaging in sexual acts with another voice student in a dressing room after a recital.

DISCUSSION

I.

In the State's case, the prosecutor asked several witnesses to whom Ethan had disclosed the sexual abuse to describe Ethan's demeanor when he did so. Defense counsel

objected and was granted a continuing objection to these questions. The witnesses testified about their observations of Ethan's demeanor when he told them about being sexually abused by the appellant.

The appellant contends that the trial court erred as a matter of law by admitting this testimony about Ethan's "demeanor." He argues that the testimony was hearsay that was outside the scope of any exception to the rule against hearsay, including the exception for prompt complaints of sexually assaultive behavior.

Whether evidence is hearsay is a question of law that we review *de novo*. *Bernadyn v. State*, 390 Md. 1, 8 (2005). 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). Hearsay is inadmissible, unless an exception applies. Md. Rule 5-802.

The testimony at issue here was not hearsay. The prosecutor asked the witnesses to describe their observations of Ethan's physical and emotional appearance when he made the disclosure to them. Hearsay is an out-of-court **statement**. Md. Rule 5-801(c). Ethan's demeanor was not a statement. In describing Ethan's appearance when he was disclosing to them that he had been sexually abused by the appellant, the witnesses were not relating to the jury any statement Ethan had made out of court. The probative value of the witnesses' testimony about their observations of Ethan's demeanor depended upon the credibility and perception of the witnesses, and not upon the truth of any statement made to them by Ethan.

See Cordovi v. State, 63 Md. App. 455, 467 (1985) (observing that when witness testified about the defendant's demeanor during a telephone call, the jury was called upon to appraise the witnesses's observation "and not the truth of anything that might have been communicated to him.").

The trial court did not err in admitting this non-hearsay evidence.

II.

On the second day of trial, the appellant testified in his own defense. His attorney sought to admit a photograph of him sitting in a chair, wearing only his underwear. The prosecutor objected, noting that the photograph had not been disclosed in discovery. She also suggested that defense counsel had failed to disclose evidence in a timely fashion during the appellant's first trial, which had ended in a mistrial. Defense counsel responded that the photograph had been taken two days earlier (the day before trial). He acknowledged that he had not informed the prosecutor of the photograph's existence or that he intended to offer it into evidence.

The trial court sustained the objection, explaining that the photograph would not be admitted "[b]ecause you didn't give them notice, or you didn't show it to them, or at least tell them it existed. . . ."

Under Rule 4-263(e)(6), the defendant in a criminal case shall provide the State an "opportunity to inspect, copy, and photograph any documents, . . . recordings, photographs, or other tangible things that the defense intends to use at a hearing or at trial." Rule 4-263(n),

governing sanctions for discovery violations in criminal cases, gives a trial court broad discretion in crafting sanctions for a violation of the rule or a court order:

> [T]he court may order [the violating] party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

This Court will overturn a trial court's exercise of discretion in fashioning an appropriate discovery violation sanction only if the sanction is so "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *McLennan v. State*, 418 Md. 335, 353-54 (2011) (quoting *Gray v. State*, 388 Md. 366, 383-84 (2005)) (internal quotation marks omitted) (upholding trial court's decision to exclude testimony of defense alibi witnesses). *See Breakfield v. State*, 195 Md. App. 377, 391 (2010) ("Rule 4-263 makes plain that defendants may not wait until trial to disclose their evidence, and if they do, the trial court has authority to exclude such evidence from the case.").

In this case, consistent with Rule 4-263, the parties were ordered to furnish all exhibits to the opposing party before trial. Rule 4-263(h)(2). Defense counsel did not furnish the photograph to the prosecutor or even reveal its existence until right before he attempted to introduce it into evidence. The appellant argues that the trial court abused its discretion by precluding him from introducing the photograph even after the prosecutor reviewed it because, earlier the same day, the trial court had admitted a floor plan of the appellant's

powder room that the defense also had not disclosed, after giving the prosecutor the opportunity to review it during a brief recess.

This argument is not at all helpful to the appellant. The photograph was the second item of evidence the defense sought to introduce without having complied with the mandate that it furnish its evidence to the State in advance of trial. Defense counsel could have given the prosecutor the photograph on the day it was taken. He did not do so, and did not even give it to the prosecutor before beginning his direct examination of the appellant, late in the afternoon of the second day of trial, after the defense had called four witnesses. Under the circumstances, the trial court reasonably could have concluded that defense counsel's failure to make a timely disclosure constituted an intentional effort to obtain an unfair advantage by means of surprise. The trial court did not abuse its discretion by excluding the photograph from evidence.[2]

III.

The appellant sought to discredit Ethan's account of the abuse by showing that Ethan's reports and testimony were inconsistent as to when the abuse took place. On cross-

[2] The appellant maintains that the photograph was relevant to show that, because of his weight, he could not display his penis while in a seated position. The photograph would have had limited probative value, if any. It depicted the appellant in his underwear in an upright, seated position, his penis neither visible nor erect. Ethan had testified, however, that, during his encounter with the appellant, the appellant had been seated in a lounging position. It was from that position (not sitting upright) that he unzipped his pants and made Ethan touch his erect penis.

examination of the investigating detective, defense counsel asked several questions to clarify what Ethan had said about when the abuse happened.

Referring to the detective's investigation notes, the prosecutor asked the detective "why do you have a question mark there?" (The question mark was handwritten next to the dates of abuse.) The trial court limited the scope of the detective's response to explaining "why he put a question mark next to that date," and instructed the jury that this testimony was being admitted only for that purpose. The detective responded, stating that sometimes a child witness's account "isn't as accurate as we would hope for." Defense counsel objected, arguing that the detective should not be permitted to testify generally about "what issues other children may have." The court overruled the objection. The detective then explained that the investigators often have to go back and do the math to create a time line based on what information the child is able to provide, and that the question marks in his notes indicate those places where he needed more information or he had to go back and figure out approximately what month and year the alleged events occurred.

Before this Court, the appellant contends the trial court erred by allowing the detective to offer "an expert opinion about the historical memory of child witnesses without having been identified or accepted as an expert at trial"; and that the admission of the detective's testimony without the proper foundation was reversible error.

A non-expert witness may give opinion testimony in limited circumstances, as defined by Rule 5–701. That rule allows a lay witness to express an opinion that is "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the

witness's testimony or the determination of a fact in issue." The rule does not permit a lay witness to provide testimony that requires "specialized knowledge, skill, experience, training or education." *State v. Payne*, 440 Md. 680, 699 (2014) (quoting *Ragland v. State*, 385 Md. 706, 725 (2005)) (internal quotation marks omitted). Testimony on matters outside the general knowledge of the judge and jurors must be provided by qualified expert witnesses. *See* Md. Rule 5-702 (expert testimony "may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue."); *Payne*, 440 Md. at 699 (opining that "[t]estimony elicited from an expert provides useful, relevant information when the trier of fact would not otherwise be able to reach a rational conclusion" without resorting to "mere speculation and conjecture").

The appellant's argument rests upon an inaccurate characterization of the detective's testimony. The detective stated that a "child's account is sometimes not as accurate as you would like." The appellant asserts that the detective testified "about how children, presumably *sexually abused* children, typically misremember dates when interviewed by detectives." The appellant's version of the detective's testimony both narrows the context of the detective's remarks to only sexually abused children in interviews with detectives, and overstates the frequency of mistakes by describing them as "typical." The detective's actual testimony was the kind of observation any person reasonably might make after speaking to a child about an event that occurred in the past.

In any event, the detective did not have to be an expert witness to explain the significance of the notation in his own investigation notes. In its limiting instruction, the trial court made clear that the detective's testimony was being admitted only to explain why he wrote question marks in his notes. It was not admitted to prove that children sometimes do not accurately remember dates. The trial court did not abuse its discretion by admitting this testimony for its limited purpose.

IV.

The appellant maintains the prosecutor made a host of remarks in her closing arguments that were improper: a "golden rule" argument, arguing facts not in evidence, vouching, and denigrating defense counsel. He argues that the cumulative effect of these improper arguments denied him his right to a fair trial.

With one exception, discussed below, there was no objection to any of the prosecutor's allegedly improper remarks. The unobjected to remarks are not properly before us for review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ."); *Jones-Harris v. State*, 179 Md. App. 72, 102 (2008) (a complaint that remarks in closing argument were improper is waived if "the improper argument alleged was not brought to the attention of the trial judge either when the argument was made or immediately after the prosecutor's initial argument was completed").

Recognizing this problem, the appellant asks us to engage in plain error review to evaluate whether "the cumulative effect of the prosecutor's remarks was likely to have

improperly influenced the jury." *Lawson v. State*, 389 Md. 570, 604 (2005). Closing arguments in this case were lengthy, filling more than 70 pages of trial transcript. In his brief, the appellant identifies several excerpts from the prosecutor's closing and rebuttal arguments that he now asserts were improper. He fails to give us any compelling reason to undertake such a review, however. He summarily asserts that the various remarks were prejudicial, cites a few cases in which this Court or the Court of Appeals has opined that certain arguments are improper, and equally summarily concludes that both plain error review and reversal of his convictions are required. At no point does he articulate how any error committed by the trial court either was plain or was material to his rights. Plain error review is an extraordinary remedy, to be undertaken only in instances of "truly outraged innocence." *Herring v. State*, 198 Md. App. 60, 86-87 (2011) (quoting *Morris v. State,* 153 Md. App. 480, 522-23 (2003)). We nevertheless shall briefly review the arguments made.

"Maryland law is clear that counsel have great latitude in the presentation of closing arguments, and any restriction of remarks is within the trial court's sound discretion." *Wise v. State*, 132 Md. App. 127, 142 (2000). "[A]ttorneys are afforded great leeway in presenting closing arguments," so long as their arguments are "confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel." *Degren v. State*, 352 Md. 400, 429-30 (1999) (citations and internal quotation marks omitted). Moreover, "[n]ot every improper remark . . . necessarily mandates reversal, and what exceeds the limits of permissible comment depends on the facts in each case." *Id*. at 430-31 (citations and internal quotation marks omitted). Reversal is warranted

only when a "prosecutor's remarks actually misled or were likely to have misled the jury to the defendant's prejudice," or when the arguments "trespass[ed] upon a defendant's Constitutional rights." *Wise*, 132 Md. App. at 142. On review, we only will reverse a trial court's ruling that an argument was acceptable if the court "clearly abused the exercise of its discretion and prejudiced the accused." *Ware v. State*, 360 Md. 650, 682 (2000) (citation and internal quotation marks omitted).

As noted, only one remark by the prosecutor in closing was objected to. The prosecutor said:

> I would ask you to ask yourself what makes sense, because if you're an 11-year-old boy, a 12-year-old boy, a 13-year-old boy, and you're confused about your sexuality, and you're confused about sex, are you going to go up to an adult --
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Come here.
>
> [DEFENSE COUNSEL]: I have an objection of putting them in the role, if you're Ethan, "if you're a 12-year-old boy." If it's "a 12-year-old boy" I wouldn't object, but you can't say "if you were a 12-year-old boy," if you were Ethan. She's putting them in the role of the victim.
>
> THE COURT: Well, I think it's more generic than that.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Thank you.
>
> THE COURT: You may proceed.
>
> [PROSECUTOR]: Thank you, your honor. Is a 12-year-old, 13-year-old, 11-year-old boy going to approach an adult, without knowing that that's a safe person to talk to about this, without having some invitation that you can

> talk about sex, and say, "Hey, tell me about blow jobs"? Does that make sense to you?

The appellant argues this was an improper "golden rule" argument and the trial court abused its discretion by permitting it. A "golden rule" argument is one in which the jurors are "asked to place themselves in the shoes of the victim." *Lawson*, 389 Md. at 594. It is considered an improper appeal to the jurors to abandon their neutral role and decide the case based on their passions and prejudices, thus depriving the defendant of a fair trial. In *White v. State*, 125 Md. App. 684, 702-05 (1999), we discussed proper closing argument and improper appeals to passion and prejudice. We explained that,

> [w]hen prosecutors or defense attorneys accurately recount the evidence, even though the evidence arouses emotion, they do not trespass beyond the line that prohibits an unwarranted appeal to passion. The evil to be avoided is the appeal that diverts the jury away from its duty to decide the case on the evidence.

Id. at 704.

In the case at bar, the prosecutor did not "urge[] the jurors to imagine that they were a preteen boy" or to imagine that they were Ethan, as the appellant argues. She merely invited them to rely upon their own common sense and experience as former teenagers in assessing the credibility of the appellant's testimony. Jurors are routinely instructed to "apply [their] own common sense and life experiences" when considering the credibility of witnesses. MPJI - Cr. 3:10. The prosecutor's comment was not an improper golden rule argument, and the trial court did not err by overruling the appellant's objection.

The appellant complains that the prosecutor "referenced facts not in evidence" when (as characterized by the appellant) she argued that he "claimed erectile dysfunction to dispute Ethan's allegations that the Appellant's penis was 'hard."' He does not include in the excerpts he provides from the prosecutor's argument any remark that can be read to suggest that he suffered from erectile dysfunction. Nor does he provide a transcript reference to identify the argument he intends to challenge. Because the appellant has failed to identify the allegedly improper comment and makes only the barest argument in support of his contention, we will not consider this assertion any further. *See Diallo v. State*, 413 Md. 678, 692-93 (2010) ("[a]rguments not presented in a brief or not presented with particularity will not be considered on appeal." (alteration in original) (citations and internal quotation marks omitted)).[3]

[3]In closing rebuttal argument, the prosecutor stated:

> So what does he give you in terms of his argument that [it] is in fact a physical impossibility that he could have had an erection and [it] is a physical impossibility that Ethan could have touched his penis. . . . [Purportedly] this picture proves that it was physically impossible for him to get an erection, and for Ethan to touch his penis. Okay, that's fine. But if [appellant] . . . had been, in fact, in a lounge position, would that have prevented that child from touching his penis? Well, of course not, ladies and gentlemen.

These remarks, taken in context, were a challenge to the appellant's contention that Ethan had to be lying about the abuse because he could not have touched the appellant's penis while the appellant was sitting on the couch. If these are the remarks the appellant is complaining about, they did not reference facts not in evidence.

The appellant asserts that in three instances the prosecutor vouched for the State's witnesses. A prosecutor vouches when she "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" but known to the prosecutor "supports the witness's testimony." *Spain v. State*, 386 Md. 145, 153 (2005) (alterations in original) (quoting *U.S. v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)) (internal quotation marks omitted). When "'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 [is] based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching.'" *Id*. at 155 (quoting *U.S. v. Walker*, 155 F.3d 180, 187 (3d Cir. 1998)). "The rule against vouching does not preclude a prosecutor from addressing the credibility of witnesses in its closing argument. The credibility of witnesses in a criminal trial often is . . . a critical issue for the jury to consider." *Sivells v. State*, 196 Md. App. 254, 278 (2010).

In the first instance, after acknowledging that there was tension between the appellant and Ethan about whether Ethan would continue voice lessons or focus more on dance, the prosecutor argued:

> That's just a fact. And part of the presentation of this case, because we are the State, is that we're trying to present to you a full and accurate picture of what was going on with these people. And if those facts sometimes are not perfect, I mean, that's just because it is what it is. I mean it's the truth. The truth isn't always clean, sometimes it's messy.

Viewed in context, the prosecutor was pointing out that the State was not discounting Ethan's testimony about the tension, even though that testimony appeared to strengthen the

appellant's theory that Ethan had fabricated his allegations of abuse to avoid taking voice lessons. This argument was not vouching.

In the second instance, referring to Ethan's testimony that the second sexual assault took place in a powder room in the appellant's house, the prosecutor argued that if Ethan was going to make up a story about being sexually assaulted by the appellant, who weighed 350 pounds, the last and most unbelievable place he would have picked as the setting for the assault would be a tiny powder room. The prosecutor was making a legitimate credibility argument and was not vouching.

In the final instance, the appellant points to a comment at the end of the prosecutor's rebuttal in which she says, "Ladies and gentlemen, we know that Ethan is telling the truth. . . ." He omits the prosecutor's lengthy explanation of why the jury should view the circumstances of Ethan's disclosure of the abuse, his reluctance to report the abuse, and his demeanor during the disclosures as additional proof that his testimony is credible. Read in context, this too was a proper credibility argument and was not vouching. We note that in none of the remarks identified by the appellant does the prosecutor assure the jury of a witness's credibility based on the prosecutor's personal belief or on evidence that was not presented to the jury at trial.

Finally, the appellant argues that some of the prosecutor's statements denigrated defense counsel by (in the appellant's words) suggesting that he "suborned perjury or fabricated a defense," in contravention of numerous Maryland cases holding that such an argument is improper. *See e.g. Hunt v. State*, 321 Md. 387, 435 (1990); *Reidy v. State*, 8 Md.

App. 169, 178-79 (1969). This Court has opined that "[i]t is fundamental to a fair trial that the prosecutor should make no remarks calculated to unfairly prejudice the jury against the defendant." *Reidy*, 8 Md. App. at 172.

For all his adult life, the appellant was a singer and actor in musical theater. He was a "performer," as were many of the witnesses at trial. Apparently, the parties' mutual involvement in the musical and dramatic arts inspired the prosecutor to adopt an acting and performing theme, including assertions that the testimony of the appellant and the defense witnesses was "rehearsed,"[4] that the appellant's defense was "part of [a] stage production, orchestrated by [the appellant] and by his attorney," and that the appellant and his attorney were "trying to construct" or "fabricate" an image that was consistent with the appellant's account of his relationship with Ethan.

We are not persuaded that the prosecutor's comments were improper. *Degren*, 352 Md. at 430-31 ("[W]hat exceeds the limits of permissible comment depends on the facts in each case." (citation and internal quotation marks omitted)). It was apparent from the outset of trial that Ethan's account of what happened and the appellant's account of what did not happen were diametrically opposed and mutually exclusive. In his opening statement and

[4]Where such an argument is supported by the evidence, there is nothing wrong with encouraging the jury to evaluate the credibility of witnesses based on their manner of testifying. MPJI - Cr. 3:10 (instructing that the jury may consider factors such as "the witness's behavior on the stand and manner of testifying" and "whether the witness appeared to be telling the truth" in determining the credibility of witnesses). The prosecutor was urging the jury to conclude that the manner in which the State's witnesses testified made them more credible than the defense witnesses, who, she argued, appeared rehearsed.

in his closing argument, defense counsel flatly accused Ethan of lying: "We're here today because of false allegations made by a disgruntled teenager." Not surprisingly, the prosecutor, in turn, argued that the appellant was the one who was being dishonest. Although some of the prosecutor's comments may have been inartfully phrased, we are not compelled to conclude that her remark that the appellant and defense counsel were trying to construct or fabricate an image to support their defense denigrated defense counsel. (None of the prosecutor's allegedly improper comments were so egregious or inflammatory as to prompt defense counsel to object.) At no point did the prosecutor suggest that either the appellant or his attorney had engaged in any misconduct in the course of the trial. Nor are we persuaded that any of the prosecutor's comments "actually misled or were likely to have misled the jury to the [appellant's] prejudice," or that the remarks were "calculated to unfairly prejudice the jury against [him]." *Wise*, 132 Md. App. at 142; *Reidy*, 8 Md. App. at 172.

V.

Four days before trial, the prosecutor sent defense counsel an email containing supplemental discovery materials, including a summary of the oral statements of the State's witnesses made during trial preparation interviews. Defense counsel did not receive the email. On the day before trial, during a phone call, the prosecutor asked defense counsel whether he had received the email. When defense counsel responded that he had not, the prosecutor immediately offered to resend the discovery materials, and did so. Again, defense counsel did not receive the email. He did not tell her that or follow up to obtain the

supplemental discovery materials, however, so the prosecutor was under the impression that defense counsel in fact received the second email. It was not until the second day of trial that defense counsel informed the prosecutor and the court that he had not received the second email.[5]

After the conviction, defense counsel filed a motion for new trial, asserting that he had not received the supplemental discovery materials before trial and, if he had, he would have been better able to disprove Ethan's account of the sexual abuse and to support the defense theory that Ethan was angry with the appellant for yelling at him during a rehearsal. The trial court denied the motion, concluding that there was nothing in the supplemental discovery materials that created a substantial possibility that the outcome of the trial would have been different.

The appellant contends the trial court abused its discretion by denying his motion for new trial. He does not provide any legal authority in support, stating only that his case was "materially hampered by the failure of the State to ensure that the defense knew" about the content of the supplemental discovery materials prior to trial.

[5]While the prosecutor was examining one of the appellant's other voice students, defense counsel objected. He stated that he never received the second email, and had texted the prosecutor that morning. The trial judge responded that the prosecutor "properly sent it" (the email) and defense counsel neglected to inform her (or the court) before that day that he did not receive it. The judge concluded he was "not going to be able to do anything about it now." Defense counsel did not request that the discovery materials be furnished at that time, and the appellant does not contend that additional requests were made by his attorney and refused by the prosecutor.

Upon motion of a party filed within ten days after a verdict, a trial court may order a new trial "in the interest of justice." Md. Rule 4-331(a). Ordinarily, we review a trial court's ruling on a motion for new trial for abuse of discretion. *See e.g. Mack v. State*, 300 Md. 583, 600-01 (1984) ("[A]n appellate court does not generally disturb the exercise of a trial court's discretion in denying a motion for new trial."); *accord Cutchin v. State*, 143 Md. App. 81, 96 (2002). When, however, "the losing party or that party's counsel, without fault, does not discover the alleged error during trial," we utilize the harmless error standard of review to determine whether the party was prejudiced by the error. *Merritt v. State*, 367 Md. 17, 30-31 (2001).

In the instant case, defense counsel was not "without fault" with regard to his failure to obtain the supplemental discovery materials prior to trial, nor did defense counsel discover the alleged error after trial. Before the start of trial, defense counsel was on notice that the prosecutor twice had sent him an email attaching the supplemental discovery materials. He failed to inform the prosecutor that he had not received the email until the second day of trial. As noted, the prosecutor had assumed, reasonably, that defense counsel had received the second email. Had defense counsel timely informed the prosecutor that he had not received the second email, the prosecutor could have delivered hard copies of the supplemental discovery materials to defense counsel before the trial began. Moreover, it is clear from the record that defense counsel discovered the alleged error before the end of trial. Because defense counsel bears some responsibility for the error, we need not consider any prejudice

to the appellant from the late disclosure. Instead, we shall review the trial court's denial of the appellant's motion for abuse of discretion only.

In denying the appellant's motion for new trial, the trial court made extensive comments on the record explaining why the evidence that was disclosed in the supplemental discovery materials would not have made any difference in the jury's determination of the appellant's guilt. The court discussed two categories of the late disclosed evidence: statements made by other voice students about the incident when the appellant yelled at Ethan during a recital rehearsal, and statements made by Ethan about his position in the tiny powder room during the second incident of sexual abuse.

In their statements, the other voice students described the incident as one in which the appellant yelled at a group of students, including Ethan, for laughing at another student during a recital rehearsal. The court found that this evidence was not probative of the ultimate question whether the appellant had sexually abused Ethan. Rather, it was probative to show one of the motives (out of several offered by the defense) for Ethan to have fabricated abuse allegations. The court pointed out that this evidence largely was duplicative of testimony presented at trial.

As to the evidence about Ethan's account of his and the appellant's positions in the tiny powder room during the second incident of abuse, the trial court noted that the jury was able to observe the parties and the defense's life-size diagram of the powder room and decide for themselves whether the abuse could have happened as Ethan had alleged.

Ultimately, the trial court observed that the appellant was able to make his arguments and present his defense to the jury, but the jury believed that Ethan was telling the truth and the appellant was not. The court commented that defense counsel "did a phenomenal job" and afforded the appellant "excellent representation." Opining, in conclusion, that the verdict was "well supported by the evidence that [the jurors] heard," the trial court denied the appellant's motion for new trial. We see no abuse of discretion in this ruling.

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