Circuit Court for Montgomery County
Case No. C-15-CR-23-000584

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1819

September Term, 2024

LEWIS LYNN

v.

STATE OF MARYLAND

Wells, C.J.,
Zic,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: June 23, 2026

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

Following a trial in the Circuit Court for Montgomery County, a jury convicted appellant Lewis Lynn of sexual abuse of a minor, second-degree rape, and eight counts of third-degree sexual offense. The circuit court sentenced Mr. Lynn to a total of 125 years in prison, suspending all but 34 years, after which Mr. Lynn noted a timely appeal. Mr. Lynn presents three questions for our review, which we have slightly rephrased:[1]

1. Did the circuit court err in permitting testimony about Mr. Lynn's refusal to speak with law enforcement during the investigation?
2. Did the circuit court err in allowing R.[2] and Mother to testify about Mr. Lynn's drinking behavior?
3. Did the circuit court err in overruling Mr. Lynn's objections to the State's rebuttal closing argument?

For the reasons that follow, we answer all three questions in the negative and affirm.

BACKGROUND

In January 2023, then ten-year-old R. handed an administrative secretary at her elementary school a post-it note on which she had written, "My granddad [sexually

[1] Mr. Lynn phrased the questions as follows:

1. Did the [circuit] court err in allowing Detective Maines to testify that [Mr. Lynn] refused to speak with her during the investigation?
2. Did the [circuit] court err in allowing [R.] to testify that [Mr. Lynn] left the home because he "became really aggressive due to the years that he was drinking at the time towards [] [G]randmother" and in allowing [Mother] to testify that [Mr. Lynn] drank beer and got drunk on a regular basis?
3. Did the [circuit] court err in overruling [Mr. Lynn]'s objections to multiple improprieties during the State's rebuttal closing argument?

[2] We use a random initial to designate the child to protect her identity.

assaulted] me[.] I don't know how to tell my dad[.]" (Cleaned up.) The administrative secretary, Yesenia Diaz, as a mandatory reporter, notified the school's principal, R.'s father, Child Protective Services, and the police of the allegation of sexual abuse. Montgomery County Police responded to R.'s school and interviewed the child. The ensuing investigation led to the arrest of Mr. Lynn.

R., 11 years old at the time of trial, testified that when she was between the ages of approximately one and seven years, she lived with her mother ("Mother") and her brothers at her grandmother's ("Grandmother") house; Mr. Lynn, her "grandfather" also lived in the house.[3] R. explained that in fourth and fifth grade, she had taken body safety classes in school. The classes taught about puberty, "private parts[,]" and "keeping our private[] [parts] away from other people," except parents and doctors. It was then that R. realized Mr. Lynn had touched her in a way that was not acceptable during the time she lived with Grandmother.

R. recalled that the first instance of Mr. Lynn's inappropriate touching occurred when she was two or three years old. She testified that Mr. Lynn took her to Grandmother's room, removed her clothes, laid her on the bed, and touched her vagina (which she called her "lady area"), her bottom, and her breast with his hand. Mr. Lynn told her "[t]o keep [her] mouth shut" or "he would kill [her] entire family" with a knife.

[3] Mr. Lynn, Grandmother's domestic partner, was not R.'s grandfather by blood or marriage. R. called Mr. Lynn "Pappy," while other family members called him "Dinky." Mr. Lynn moved out of Grandmother's home when R. was six or seven years old, and R. went to live with her father.

When the State asked how many times Mr. Lynn touched her private parts after the first time, R. answered that it was "too many [times] to count[.]"

Later instances of inappropriate touching occurred in the living room and a bathroom in the house when no one else was home and Mr. Lynn was babysitting R. On occasion, Mr. Lynn placed R.'s hand on his penis and moved it up and down, which would sometimes cause his penis to harden, feeling wrong to her. Other times, starting when she was four or five years old, Mr. Lynn sat R. on the toilet, or got in the bathtub with her, and touched her vagina and breast. Between five or ten times, R. said, Mr. Lynn touched the inside of her vagina with his finger, "which hurt a lot worse than on the outside" and caused her to "cry [] and scream."

Shortly before making her disclosure to Ms. Diaz, R. was crying in her room, and her Mother's sister ("Aunt") asked if Mr. Lynn had ever touched her. R. asked her Aunt how she knew. Aunt responded that when R. was a baby, Aunt walked in on Mr. Lynn doing something inappropriate to her, leading to a big fight between them.[4] R. and Aunt then told Mother about the touching; Mother and Aunt said they would notify the police and R.'s father when R. was ready.

The next day, R. wrote her disclosure on a sticky note and gave it Ms. Diaz, a trusted adult at her school. R. said she did not tell anyone sooner because she feared Mr. Lynn might find out and come back and follow through on his threats to kill her family.

[4] Testifying for the defense, Aunt later denied having observed Mr. Lynn inappropriately touching R., telling R. that she had made such an observation, or engaging in a fight with Mr. Lynn.

Mother testified that when R. was a toddler, Mr. Lynn or his son watched R. and her other children while she was at work. Even after R. started school, Mr. Lynn occasionally watched her in the afternoons.

When R. was approximately eight years old, Mr. Lynn moved out of the house, following a "huge argument" with Mother and D.,[5] the father of Mother's youngest child. The fight began when Mr. Lynn went upstairs, pulled a pair of R.'s underwear out of his pocket, and said to Mother, "look what I got." Mother and D. were furious that Mr. Lynn had R.'s underwear. After Mr. Lynn moved out of the house, R. had no further contact with him.

On the day R. disclosed that Mr. Lynn had touched her inappropriately, Mother observed the child to be angry, sad, and uncommunicative. Mother had received a call from R.'s school indicating that R. "was acting out and that she was threatening to kill herself." R. had also "wr[itten] a note to [Mother] saying that she just wanted to die." Believing she might be able to get R. to open up, Aunt spoke with the child. When she exited R.'s room, Aunt was sobbing, but she did not want to tell Mother what she had learned. R. eventually told Mother that Mr. Lynn had touched her. The next day, R. wrote the note to Ms. Diaz and the police became involved.

[5] We use a random initial to designate this individual to protect his identity.

Monica Reaves, a social worker with Child Welfare Services, conducted a forensic interview[6] with R. in January 2023. A video of the interview was introduced into evidence as State's exhibit 7 and played for the jury. During the interview, R. disclosed the many times Mr. Lynn touched her inappropriately.

Dr. Evelyn Shukat, a child abuse pediatrician, examined R. in March 2023. To Dr. Shukat, R. disclosed that she had been "touched in bad places" and "was worried if she was okay in those places." R. further disclosed during the examination that, on one occasion, Mr. Lynn had "digitally penetrated her vagina," and that "she experienced pain and bleeding [up]on urination."

R.'s physical examination was normal. Given that, at the time of the examination, approximately four years had passed since R. had seen Mr. Lynn, Dr. Shukat did not expect to observe any traumatic findings. She could neither confirm nor rule out sexual abuse.

Montgomery County Police Detective Courtnie Maines, assigned to the Special Victims Investigations Division, Child Abuse/Sex Assault Unit, investigated R.'s disclosure of sexual abuse by Mr. Lynn after receiving the report from R.'s school. Following Ms. Reaves's forensic interview of R., Detective Maines and a Child Protective Services worker interviewed R.'s parents and Ms. Diaz. Detective Maines and the Child Protective Services worker attempted to speak with R.'s family members, but

[6] Ms. Reaves explained that "a forensic interviewer conducts interviews of children that have made allegations of abuse or neglect. And specifically, the forensic interview is a neutral encounter between the child and the interviewer, where the interviewer has specialized training."

they declined to participate in the investigation. A decision was made to refer the matter to the State's Attorney's Office because Detective Maines "ha[d] zero to go on other than [] [R.]'s disclosure."

STANDARD OF REVIEW

"We review rulings on the admissibility of evidence [] on an abuse of discretion standard." *Townes v. State*, 264 Md. App. 500, 516 (2025) (quoting *Bernadyn v. State*, 390 Md. 1, 7 (2005)).

"Because '[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[,]' the exercise of its broad discretion to regulate closing argument will not be overturned 'unless there is a clear abuse of discretion that likely injured a party.'" *Anderson v. State*, 227 Md. App. 584, 589-90 (2016) (noting that "[w]hat exceeds the limits of permissible comment or argument by counsel depends on the facts of each case. Thus, the propriety of prosecutorial argument must be decided contextually, on a case-by-case basis.") (quoting *Ingram v. State*, 427 Md. 717, 726 (2012)). We review burden-shifting claims, however, "without deference to the circuit court" because such claims constitute "allegation[s] of a violated constitutional right[.]" *Harriston v. State*, 246 Md. App. 367, 372 (2020) (citation omitted).

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN OVERRULING MR. LYNN'S OBJECTION TO DETECTIVE MAINES' TESTIMONY.

A. Factual Background

Upon direct examination by the State, Detective Maines testified that, following interviews with R. and her parents, the next step in her investigation was an attempt to speak with R.'s other family members, but they "declined to participate." Specifically, Detective Maines explained: (1) Grandmother was not willing to speak with her or the assigned social worker; (2) Aunt "spoke briefly with the social worker, but then declined to be involved"; (3) Mother initially agreed to attempt a phone sting to implicate Mr. Lynn but failed to show up for several scheduled appointments and then "fell off the radar as far as responding back to [Detective Maines'] attempts to make contact;" and (4) R.'s father "was a willing participant" in the investigation and tried to engage Mr. Lynn in a phone sting by text, but did not receive a response.

At the start of her cross-examination, defense counsel asked Detective Maines if, in "historical sex abuse cases" like this one, when "there is a delay between the time of the alleged abuse and the [victim's] subsequent disclosure" and there is no DNA evidence of the crime, "other avenues of investigation become more important[.]" When Detective Maines agreed that they do, defense counsel brought up what she characterized as the police department's "lack of investigation," including the failure to: (1) visit Grandmother's house to verify R.'s description of the layout; (2) speak with Mr. Lynn's son, who had spent time in the house; (3) make stronger attempts to speak to Aunt,

knowing R. had made a prior disclosure to her; (4) speak to D., who was "present and may have been actively involved in" the alleged fight that led to Mr. Lynn leaving the house for good, to corroborate whether that fight actually occurred; (5) verify Mother's and Grandmother's work schedules to determine if they were out of the house during times R. claimed Mr. Lynn abused her; and (6) determine whether there was a police incident report to corroborate the claim that Aunt had been involved in a "physical altercation" with Mr. Lynn "related to the alleged sexual abuse" that resulted in the police "escort[ing] [her] out of the room."

At the conclusion of that line of questioning, defense counsel asked Detective Maines if she had taken other investigative steps between March 2023 and the April 2023 issuance of charges against Mr. Lynn. Detective Maines answered that there was one additional step:

> [DETECTIVE MAINES]: Yes. I actually forgot to mention this to the State. I did attempt to reach out to Mr. [Lynn] []. I did make contact with him.
>
> [DEFENSE]: I thought you didn't have his phone number?
>
> [DETECTIVE MAINES]: I had Mr. [Lynn's] [] phone number, yes.
>
> [DEFENSE]: You said that you were unable to provide -- to do the controlled call with Mr. C. because Mr. C. didn't have Mr. Lynn's phone number?
>
> [DETECTIVE MAINES]: He did not have his correct phone number at the time. I went through a series of phone numbers for Mr. Lynn and obtained the correct phone number.

On redirect examination, the State asked Detective Maines to again summarize her investigation between March and April 2023. Detective Maines responded:

[DETECTIVE MAINES]: During that time frame, we continued to try to make contact with the aunts, with [G]randmother. We -- I interviewed Ms. Diaz at the school, and -- no, that was before March. And I attempted to arrange an interview with Mr. Lynn.

[STATE]: And did Mr. Lynn agree to speak with you?

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: You can answer.

[DETECTIVE MAINES]: [Mr. Lynn] was hesitant at first. He did agree to speak with me. I was going to meet him at the police headquarters in Hagerstown, and then he declined to meet with me.

[STATE]: Okay. And then after he declined to meet with you, was there anything further you could do to move your investigation forward?

[DETECTIVE MAINES]: No.

[STATE]: And is that when you decided to get charges?

[DETECTIVE MAINES]: I decided to get charges after reviewing the details of the case and the victim's disclosure with the State's Attorney's Office.

[DEFENSE]: Objection.

THE COURT: Overruled.

B. Parties' Arguments

Mr. Lynn argues that the circuit court erred in permitting Detective Maines to testify that he agreed to speak to her as part of her investigation but then did not appear at the scheduled meeting. The testimony, Mr. Lynn continues, amounted to impermissible commentary on his "pre-arrest silence" and should not have been admitted as an inference of his guilt. Citing *Weitzel v. State*, 384 Md. 451 (2004), Mr. Lynn contends that the court should not have permitted Detective Maines to comment on Mr. Lynn's

refusal to meet with the police because his pre-arrest silence was "inadmissible as substan[tive] evidence of his guilt" and "too ambiguous to be probative."

The State counters that there was no error in admitting testimony about Mr. Lynn failing to speak with Detective Maines because it "was not a comment on his 'pre-arrest silence.'" Even if the testimony arguably should not have been admitted, the State contends, pursuant to *Weitzel*, there would be no reversible error because the State did not use the testimony as substantive evidence of Mr. Lynn's guilt.

C. Analysis

Mr. Lynn's reliance on *Weitzel* is misplaced. We explain.

In *Weitzel*, police responded to a 911 call and found "Darla Effland lying unconscious and severely injured at the bottom of a public stairwell." *Id.* at 453. With her were Mark Weitzel and an eyewitness named Thomas Crabtree. *Id.* at 453. Approximately four feet away from Mr. Weitzel, Mr. Crabtree told the police officer that it was Mr. Weitzel who threw Ms. Effland down the stairs. *Id.* Mr. Weitzel said nothing. *Id.* The officer advised Mr. Weitzel that he was under arrest, and he still "made no comment[.]" *Id.* at 454.

At trial, the court permitted the State to introduce Mr. Weitzel's "pre-arrest silence" as substantive evidence of his guilt. *Id.* at 455. On review, the Supreme Court of Maryland reversed, finding such "evidence is too ambiguous to be probative when the 'pre-arrest silence' is in the presence of a police officer[.]" *Id.* at 456. The Court explained that "the average citizen is almost certainly aware that any words spoken in police presence are uttered at one's peril." *Id.* at 461. "While silence in the presence of

an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation, a defendant's reticence in police presence is ambiguous at best." *Id.*

The present case is distinguishable from *Weitzel*. First, Detective Maines did not attest to Mr. Lynn's silence, but rather to his failure to comply with an agreed-upon course of action during the early stages of the investigation; Detective Maines stated only that Mr. Lynn agreed to meet with her but he declined to appear for the meeting.

Second, it was defense counsel, not the State, who elicited Detective Maines' testimony that she reached out to Mr. Lynn as part of her investigation. The State's single question, upon redirect examination, was in direct response to Detective Maines' answer to defense counsel's questioning on cross-examination and did not make any other reference to Mr. Lynn's failure to speak with the police.

Even were we to assume that Detective Maines' comment was inadmissible under *Weitzel*, on the ground that Mr. Lynn's failure to speak to Detective Maines was too ambiguous to be relevant, we would find any such error harmless beyond a reasonable doubt. A reversal is mandated when an error by the trial court has been established in a criminal case, "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Blair v. State*, 130 Md. App. 571, 613-14 (2000) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)) (further citations omitted). In situations where the jury hears inadmissible testimony, but it is not, as here, referenced in opening statements, mentioned in closing arguments, or used in any way as substantive evidence of guilt, the error may be harmless beyond a reasonable doubt. *See In re Kevin*

T., 222 Md. App. 671, 676 (2015) (holding testimony of the defendant's pre-arrest silence to be harmless because the State "made no attempt to draw an inference of guilt from [the defendant]'s silence in closing argument" and there was "no indication that the court was influenced by or relied on the evidence of appellant's refusal to make a statement" in the judgment).

II. THE CIRCUIT COURT DID NOT ERR IN OVERRULING MR. LYNN'S OBJECTIONS TO R.'S AND MOTHER'S TESTIMONY.

A. Factual Background

During her direct examination of R., the State asked the child why she had not seen Mr. Lynn since she was six or seven years old. R. answered:

> [R.]: [Mr. Lynn] became really aggressive due to the years that he was drinking at the time towards my [G]randmother, and my [G]randmother just wanted to leave and get out.
>
> [DEFENSE]: Objection. Objection, Your Honor. I would object.
>
> THE COURT: So objection. So I'll strike *what her* [*G*]*randmother wanted or didn't want*, and I'll ask the jury to disregard that.

(Emphasis added.)

Later, on direct examination of Mother, the State signaled its intention to ask questions about Mr. Lynn's behavior as a member of the household. At a bench conference, the following colloquy ensued:

> [STATE]: So this is where I was going to ask a question about . . . what [Mr. Lynn] was like in the household.
>
> THE COURT: Uh-huh.
>
> [STATE]: And the answer, I think, will be that he drank a lot and used crack.

THE COURT: Okay.

[DEFENSE]: Yes, I don't see how that's at all relevant to anything that happened (unintelligible) outside the presence of the jury about finding that it's true, like, (unintelligible) evidence, obviously nondefensive in purpose and that it would have probative value versus prejudicial effect. I just don't see how this is at all relevant.

THE COURT: So I mean, the crack might be a little bit too far for me, but [R.] did -- *and I did allow her to say that her grandfather was drinking. She said he drank with his son outside. He is a drinker. There's been evidence of that that wasn't objected to*, so I'm going to allow her to ask about the drinking, but I think the crack just gets into too prejudicial, and the implications of that to me don't seem appropriate under these circumstances. But there's already been testimony that he's --

* * *

[DEFENSE]: But there's already been testimony that he drank, when she testified that he would drink too many beers and that was what was sustained, so.

THE COURT: Un-huh. No, . . . what I sustained was . . . the reason the [G]randmother kicked him out because . . . [R.] couldn't testify to what the [G]randmother thought, and that's what you objected to and I sustained. *I didn't sustain about the fact that she saw him and his son drinking, and that he drank a lot.*

[DEFENSE]: Yes, but that was about the parties on the patio. [R.] testified the reason [Grandmother] kicked him out is because the incident with --

* * *

THE COURT: I didn't allow [R.] to testify, and I struck the reasons her [G]randmother kicked [Mr. Lynn] out, . . . [R.] can't speak to why her [G]randmother kicked him out. That's what I sustained.

[DEFENSE]: Well, and the objection was a general objection, and I was objecting, so I don't know if the [c]ourt ruled on that. I was trying to --

> THE COURT: Well, [R.] has personal knowledge of the drinking. She saw [Mr. Lynn] drinking.
>
> [DEFENSE]: Right, but I objected to [R.] saying that he thought (unintelligible). I don't understand how that's relevant at all.
>
> [THE COURT[7]]: So the drinking to me is relevant and especially how [Mr. Lynn] [is] acting with [R.] and what he might have been doing. I think the crack . . . just goes too far and is prejudicial. But I'll allow you to ask questions about drinking, and you can lead a little bit to prevent her from --
>
> [DEFENSE]: Can I get a --
>
> THE COURT: -- saying anything about the crack.
>
> [STATE]: Thank you.
>
> [DEFENSE]: Can I get a proffer about what the testimony is going to be about the extent of drinking, because I think there's sort of -- I think there's some --
>
> THE COURT: Do you want to --
>
> [STATE]: Well, with a leading question, I will ask something like, did he drink a lot? What times of day did he drink? And what kinds of alcohol did he drink? And that's it.
>
> THE COURT: Okay.
>
> [DEFENSE]: I would object.
>
> THE COURT: Okay. Understood.

(Emphases added.)

Following the conclusion of the bench conference, Mother testified:

> [STATE]: And when you were living or . . . staying in the house when [Mr. Lynn] was there, did he drink a lot?
>
> [MOTHER]: Yeah. He drank and did drugs.
>
> [STATE]: Well, so --

[7] The transcript ascribes this speech to the State's counsel, but we agree with the State's conclusion, that, given the context, the actual speaker was the court.

[DEFENSE]: Objection.

THE COURT: I will sustain, and I'll strike the response about drugs and ask the jury [to] just disregard altogether that word.

[STATE]: And so specifically with respect to [Mr. Lynn's] drinking, what times of day would he drink?

[MOTHER]: All times.

[STATE]: All times?

[MOTHER]: Yeah.

[STATE]: Okay.

[MOTHER]: It didn't really matter with [Mr. Lynn]. He would have a drink in the afternoon. It didn't matter if it was the morning. Didn't matter if it -- whenever he felt like drinking, he was drinking.

[STATE]: Okay. And do you know what kinds of alcohol he would drink?

[MOTHER]: Beer.

[STATE]: And did you have the opportunity to see him drunk?

[MOTHER]: Yeah. Plenty of times.

B. Parties' Arguments

Mr. Lynn contends that the circuit court abused its discretion in permitting R. and Mother to testify about his aggressive behavior and habitual alcohol consumption. In Mr. Lynn's view, this evidence amounted to irrelevant and unduly prejudicial prior "bad acts[,]" which are limited by Maryland Rule 5-404(b) "to prove the character of a person to show action in conformity with the prior bad acts." The trial court, Mr. Lynn concludes, should have prevented the jury from developing a predisposition of guilt based on his conduct unrelated to the charged offenses.

The State responds that Mr. Lynn waived this claim by failing to object when similar evidence was admitted without objection at other points in the trial. Even if this Court were to consider the issue, the State continues, Mr. Lynn's argument fails because the contested testimony did not run afoul of Rule 5-404(b), as evidence of his aggressive behavior and drinking was necessary to put the crimes in context and to help explain why R. was reticent to report the offenses sooner.

C. Analysis

We agree with the State that Mr. Lynn's argument has not been preserved for our consideration. Maryland Rule 4-323(c) provides that, "[f]or purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." A party opposing the admission of certain evidence bears the responsibility of objecting at each specific instance it is offered. *See DeLeon v. State*, 407 Md. 16, 31 (2008). A party may also request a continuing objection, which ultimately preserves the issue for appeal in the absence of several contemporaneous objections. Md. Rule 4-323(b).

Maryland appellate courts "ha[ve] long approved the proposition that [they] will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (quotation omitted). In other words, even if a party objects to the admission of certain pieces of evidence, the party waives

that objection "if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon*, 407 Md. at 31 (citation omitted). *See also Huggins v. State*, 479 Md. 433, 447 (2022) ("[U]nder Rule 4-323, the failure to object to the admission of that same evidence would . . . result in a waiver of any objections.").

To the extent that evidence of Mr. Lynn's drinking and aggressive behavior is objectionable, defense counsel did not object to its admission into evidence, and the playing for the jury of R.'s interview with Monica Reaves, during which R. stated that she no longer saw Mr. Lynn after "he was kicked out" of Grandmother's house because her parents did not want him around any of the children, as he "was just very, very abusive to [] [G]randmother. He would drink a lot." The defense also did not object when R. testified that Mr. Lynn's son would sometimes "stay during the night to have drinks outside with . . . [Mr. Lynn]." The defense's failure to object to this evidence therefore waives the issue. *DeLeon*, 407 Md. at 31 (citation omitted); *Huggins*, 479 Md. at 447.

But even if Mr. Lynn had not waived the issue, and even if we agreed that Mr. Lynn's drinking and aggressive behavior comprised prior bad acts under Maryland Rule 5-404(b), we would find no abuse of discretion in the admission of the evidence. *Townes*, 264 Md. App. at 516 (quotation omitted). Although it is true that Rule 5-404(b) renders inadmissible evidence of a defendant's prior bad acts "to prove the character of a person in order to show action in conformity" with the prior bad acts, such evidence 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[.]'"[8] *Woodlin v. State*, 484 Md. 253, 264-65 (2023) (alterations in original) (footnote, quotation, and citation omitted).

As pertinent to the matter before us, the Supreme Court has "approved bad acts evidence to show the context of the crime in many circumstances, often simply to complete the story of the offense." *Merzbacher v. State*, 346 Md. 391, 410 (1997) (quotation omitted). In *Merzbacher*, the Court concluded that the defendant's other acts that did not directly relate to the charges of physical and sexual assault of the child victims were admissible because they "served to explain and [were] particularly relevant to why [the victim], either reasonably or unreasonably, waited so long to reveal her story to the State's Attorney's Office." *Id*. at 409. The Court explained:

> [The victim's] sexual abuse was not an isolated incident devoid of setting. It took place over the course of a three[-]year period in a very specific relationship and highly intimidating atmosphere. The other crimes or bad acts evidence introduced against Merzbacher were not for conduct "wholly independent of that for which [Merzbacher was] on trial." The jury was entitled to know the setting in which the alleged sexual misconduct took place because, under the facts of this case, the setting and the crime were so intimately connected as to be inseparable.

Id. at 410 (first and second alterations added) (internal quotation omitted).

Similarly, in the instant matter, the evidence of Mr. Lynn's drinking and aggressive behavior toward Grandmother was admissible to explain to the jury why R.

[8] As the Supreme Court observed in *Harris v. State,* 324 Md. 490, 501 (1991), "[t]his is a representative list of examples in which evidence has been found to meet the exception to the general rule of exclusion; it is not a laundry list of finite exceptions."

may have waited several years to disclose the sexual abuse. Aware of Mr. Lynn's aggressive behavior and habitual drunkenness, and his explicit threats of harm to her family if she told anyone about what she later learned was inappropriate touching, R. reasonably may have been afraid to say anything. The drinking and aggressive behavior R. witnessed on more than one occasion provided the setting of the crimes, helped to explain her reticence to disclose the sexual offenses, and put into context the acts of a man in whose care she was often entrusted when no one else was around. We therefore conclude that the circuit court did not err in permitting the testimony about those acts.

III. THE CIRCUIT COURT DID NOT ERR IN OVERRULING MR. LYNN'S OBJECTIONS TO THE STATE'S REBUTTAL CLOSING ARGUMENT.

Finally, Mr. Lynn points to three instances in which the court overruled his objections to alleged improper statements by the State during rebuttal closing argument.

A. Parties' Arguments

Mr. Lynn avers that the State impermissibly vouched for R.'s credibility, disparaged defense counsel, and shifted the burden of proof to the defense, which, taken together, mandate reversal. Mr. Lynn also asserts that "the State cast aspersions on defense counsel by accusing her of 'putting out red herrings' to distract the jury from the truth and trying to draw the jury 'toward[] the fox' rather than the truth, implying the use of trickery or cunning." Finally, Mr. Lynn contends that the State, in rebuttal closing argument, engaged in improper burden shifting.

The State responds that its comments during rebuttal closing did not exceed the bounds of permissible argument because it "did not improperly vouch for [R.]'s

credibility[,]" "did not 'cast aspersions' on defense counsel[,]" and did not engage in improper burden shifting because defense counsel "opened the door" to such comments. The State further contends that Mr. Lynn did not adequately brief his argument that the State engaged in burden shifting "when it stated that '[Mr. Lynn] had to convince the jury that [R.] was lying in order to be found [not] guilty.'"

B. Legal Framework

"[A]ttorneys are afforded great leeway in presenting closing arguments to the jury." *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)). "'Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom' and, in doing so, to 'indulge in oratorical conceit or flourish[.]'" *Anderson*, 227 Md. App. at 589 (quoting *Wilhelm v. State*, 272 Md. 404, 412-13 (1974)). "As long as 'counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper[.]'" *Anderson*, 227 Md. App. at 589 (quoting *Wilhelm*, 272 Md. at 412).

1. Vouching

"Vouching typically occurs when a prosecutor '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) (quotation omitted). This does not mean, however, that a prosecutor is precluded from making any comments about the witness's credibility, which is often a critical issue for the jury to determine. *Id*. at 154. Such comments are proper and do not constitute vouching so long as any conclusions

regarding the witness's credibility are based on the evidence introduced and admitted at trial. *Id*. at 155. *See also Small v. State*, 235 Md. App. 648, 698 (2018) ("[A]lthough vouching for a witness's credibility is improper, '[t]he rule against vouching does not preclude a prosecutor from addressing the credibility of witnesses in closing argument.'") (quotation omitted); *Sivells,* 196 Md. App. 254, 278 (2010) ("[W]here 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.") (quoting *Spain*, 386 Md. at 155).

2. Disparagement of Defense Counsel

"[A] prosecutor may not impugn the ethics or professionalism of defense counsel in closing argument." *Smith v. State*, 225 Md. App. 516, 529 (2015). In determining whether a prosecutor improperly disparaged defense counsel in closing, we must make a key determination, that is, whether the comments were directed toward defense counsel in general or toward a specific argument made by defense counsel. To undermine defense counsel's ethics or professional integrity is improper; to undermine defense counsel's argument is not. *Id.*

3. Burden-Shifting

"In a criminal prosecution, the State bears the burden of proof beyond a reasonable doubt on all elements of the crimes charged and a defendant has no obligation to testify, to call witnesses, or to produce evidence." *Harris v. State*, 458 Md. 370, 377 (2018). "[B]urden-shifting claims, made in response to prosecutorial comments on a lack of

evidence supporting the defense, are borne out of the defendant's constitutional right to refrain from testifying." *Harriston v. State*, 246 Md. App. 367, 372 (2020) (citation omitted). "[E]ven if the comment was not 'tantamount to one that the defendant failed to take the stand,' . . . 'it might in some cases be held to constitute an improper shifting of the burden of proof to the defendant.'" *Molina v. State*, 244 Md. App. 67, 174 (2019) (quoting *Eley v. State*, 288 Md. 548, 556 n.2 (1980)).

"Despite [Maryland's] long history of protecting defendants' right not to testify, a prosecutor may summarize the evidence and comment on its qualitative and quantitative significance." *Smith v. State*, 367 Md. 348, 354 (2001) (citation omitted); *see also Molina*, 244 Md. App. at 174 ("The State's comment on the defense's failure to produce evidence[] . . . will not always amount to impermissible burden-shifting."). "In closing argument, lawyers have wide latitude to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence." *Smith*, 367 Md. at 354 (citations omitted). "But the State may not exceed the bounds of permissibly commenting on the absence of evidence by commenting, instead, 'directly on the defendant's failure to testify.'" *Molina*, 244 Md. App. at 175 (quoting *Smith*, 367 Md. at 360). And "Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *See Wise v. State*, 132 Md. App. 127, 148 (2000). A prosecutor's remarks are improper if they are "*susceptible of the inference* by the jury that they were to consider the silence of the traverser in the face of the accusation of the

prosecuting witness as an indication of his guilt." *Smith*, 367 Md. at 354 (emphasis in original) (quoting *Smith v. State*, 169 Md. 474, 476 (1936)).

Our Supreme Court has held that a prosecutor's statement in rebuttal closing argument that the defendant has the same subpoena power as the State can be a proper response to the defense's closing argument, which pointed out that witnesses were absent from the trial, because the defense "opened the door" to the "explanation as to why those witnesses were not present." *Mitchell v. State*, 408 Md. 368, 388-89 (2009) (citation omitted). In such a circumstance, the Court stated, the prosecutor's rebuttal calling attention to the defendant's own subpoena power "was fair comment." *Id*. at 389.

A. Analysis

1. The State's comments did not amount to impermissible vouching.

Mr. Lynn's first complaint centers on the following statement, in which he claims the State "vouched for [R.'s] credibility" and "infringed on the province of the jury as fact-finder to make that assessment for itself":

> [STATE]: So when you have a child who's as credible as [R.], with a story and a disclosure that is just so -- that is compelling and so obviously true, there's only a few things you can do to try to defend a case like that.
>
> [DEFENSE]: Objection.
>
> [STATE]: And it's putting out --
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.

We disagree with Mr. Lynn's characterization of the State's closing argument. Here, defense counsel advised the jury in closing argument that it "ha[d] to be really

sure" before making a decision as to Mr. Lynn's guilt and to "think about how the important parts of this story have changed over time about the sexual abuse itself" because "all [the jury] ha[d] to go on[]. . . [was] the victim's disclosure and nothing else. . . ." Counsel for the State's comment on rebuttal about R.'s credibility was a declaration that R.'s story and disclosure of sexual offenses were "compelling and so obviously true." The statement was tied directly to R.'s demeanor and performance on the witness stand, which the jurors had the opportunity to observe and weigh for themselves. The State's counsel made no reference to R.'s behavior, motive, or credibility rooted in evidence not presented to the jury. Nor did the State's counsel make assurances to the jury based on her own personal knowledge. The comment did not exceed the permissible bounds of the State's ability to comment on the credibility of the witness.

2. Mr. Lynn waived any objection to the State's "red herrings" comment.

Mr. Lynn specifically contests the following portion of the State's rebuttal closing argument:

> [STATE]: So the fact that defense counsel said there was no opportunity for this, it doesn't hold water because it's not what the testimony was in this case.
>
> So when you're in law school, there's, like, something called a red herring, and they always say, like, oh, that's a red herring. Don't worry about that. And . . . I was thinking about it in relation to this case, and I wanted to know . . . actually where that came from before I said it to you. So I looked it up. And this is what a red herring is. Essentially, back in olden times, when people would foxhunt, they would train the dogs to go out and hunt for the fox. The way they

> were trained, the dogs who were smelling the fox's trail, would be to use these really smelly fish -- these red herrings -- and draw them across the path that the fox was taking to get the dogs to either follow the fish -- the wrong path, or when they were better trained, to follow the actual path.
>
> * * *
>
> So when you have a child who's as credible as [R.], with a story and a disclosure . . . that is compelling and so obviously true, there's only a few things you can do to try to defend a case like that.
>
> [DEFENSE]: Objection.
>
> [STATE]: And it's putting out --
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.
>
> [STATE]: -- it's putting out red herrings, trying to draw you off that path towards the fox, towards the truth, towards your verdict.

Mr. Lynn did not object to the State's final "red herrings" comment. Therefore, he failed to preserve a challenge to the comment for appellate review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Warren v. State*, 205 Md. App. 93, 132-33 (2012) ("The record reveals that appellant failed to . . . object to the comments at issue in this appeal during the State's rebuttal closing argument. As such, any issue as to the State's remarks is not preserved for appellate review.") (citation omitted); *Conner v. State*, 34 Md. App. 124, 135 (1976) ("A failure to object [to a prosecutor's statements during closing arguments] and to request the Court's correction is a waiver of the contention for appellate review.").

Even were the issue preserved, we would find no error. In this case, counsel for the State's comments were directed toward an argument made by defense counsel. We have held that remarks about defense counsel employing "smoke and mirrors" and "red herrings" to divert the jury from the evidence presented by the State are not improper because they were directed toward defense counsel's arguments. *See Smith*, 225 Md. App. at 529 ("[T]he State's closing argument was not improper—the 'smoke and mirrors' comments were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel."); *see also* *Warren*, 205 Md. App. at 138 ("The prosecutor's calling appellant's counsel's arguments 'red herrings' was 'oratorical conceit or flourish' that was well within the wide latitude granted to counsel in summation."); *State v. Purvey*, 129 Md. App. 1, 25 (1999) (holding that the prosecutor's assertion that defense counsel "was merely 'blowing smoke' to 'divert [the jury's] attention from the facts'" was "an acceptable characterization of [the defendant's] efforts to undermine the credibility of the State's evidence").

Here, counsel for the State's comment about defense counsel "putting out red herrings" was clearly directed to defense counsel's closing argument and did not amount to a personal attack on counsel. *Smith*, 225 Md. App. at 529. This comment responded to arguments about the evidence made by the defense counsel during her closing argument and did not suggest that counsel was acting unethically or unprofessionally. We therefore conclude that the court did not abuse its discretion by overruling Mr. Lynn's objection to this portion of the State's rebuttal argument.

3. The circuit court did not err in permitting the State to comment on the defense's ability to subpoena witnesses or the defense's attempts to discredit R.'s testimony.

We last address Mr. Lynn's contention that the State improperly shifted the burden of proof. In its closing argument, the defense called into question the investigation of R.'s allegations against Mr. Lynn:

> [DEFENSE]: And finally, I want you to remember that th[ese] [sic] critical pieces of [R.'s] story, this testimony that you heard, this idea reported by [Mother] and [R.] that [] Aunt [] had at some point walked in on this, that [Aunt] [had] told [R.] that in the disclosure. [R.] was very clear with you. She was shocked. [R.] said, how did you know? And that was what prompted [Aunt] to share.
>
> But you heard from [Aunt] herself today. You heard that that wasn't true. You also heard [Aunt] told the State that earlier in this case. [The] State didn't call [Aunt] as a witness. You heard from [Aunt] that it was me. It was the defense who went to her mother's house late at night, who dragged her into court because she had important information about this case.
>
> * * *
>
> The State did not call her as a witness because it's inconvenient to their case. [Aunt] never walked in on anything.
>
> * * *
>
> The police could have investigated this case. And an investigation is not, we look for sort of something that corroborates it, and we deem everything else not relevant.
>
> * * *
>
> You heard evidence about just how many people were in and out of that house.
>
> * * *
>
> But no one from that house was interviewed except [Mother] and [R.'s] father, who really wouldn't have seen anything.

> Now, I understand that there were a few calls and texts that were sent to some of the others, to [Aunt], to [Grandmother] -- not to everyone, mind you, but some of them -- but that was it. And I want you to remember that these are police officers, so use your common sense. If a police officer is bound and determined to get critical, important, relevant evidence about a crime that might have occurred, about who might have committed that crime, I don't think that it's credible. I don't think it's reasonable. I don't think it's common sense that they would send a few texts, leave a few voicemails, and be satisfied.
>
> Even if that's true, remember the last thing that Det[ective] Maines said. *She said, well, I mean, the State's attorney can subpoena them and compel them to testify.* But again, it was the defense that did that. It was me who tracked down this witness, who brought her to court and forced her to court to give that information. The State may or may not have known it, but they didn't bother, or it didn't help their case. And so in Det[ective] Maines' words, it was deemed not relevant.

(Emphasis added.)

On rebuttal, the State responded:

> [STATE]: Defense counsel talked about all these people who were in and out of the house. [Mr. Lynn's son], all these other people. [The] State didn't bring them in, but the defense, if they thought they had something useful to say --
>
> [DEFENSE]: Objection.
>
> THE COURT: Sustained.
>
> [STATE]: Your Honor, may we approach?
>
> THE COURT: Uh-huh.
>
> (Bench conference begins)
>
> [STATE]: Mitchell v. State, [408 Md. 368 (2009),] the opening the door to witnesses not being here. The State is permitted to rebut that by noting that the defense also has subpoena power, which [are] the next words out of my mouth.

[DEFENSE]: (Unintelligible 2:52:26) I would ask the Court to strike it.

[STATE]: It is not. That's what that case says.

* * *

THE COURT: Okay. I see where you are. Okay. State's rebuttal argument is a narrow one. The prosecutor's remark calling attention to the defendant's subpoena power was a tailored response to defense counsel's assertion that all the potential witnesses should have been brought into the courtroom.

[DEFENSE]: So that's --

THE COURT: And under such a circumstance, the defense opened the door.

[DEFENSE]: That's not what I said regarding the other household members. I did not make any comment about whether or not they were subpoenaed; it was whether or not [] they were (unintelligible 2:55:45).

THE COURT: You said exactly that, that they could have subpoenaed, and they didn't. They could have brought these witnesses in, and they didn't. So I find that the defense has opened the door. I'll allow it.

* * *

(Bench conference ends)

THE COURT: All right. I'm sorry. I'm going to reverse my decision on that. And I'll allow that closing to --

[STATE]: Thank you, Your Honor.

THE COURT: -- continue.

[STATE]: The defense also has subpoena power if they thought those people had something relevant to tell you. So it's not like the State has to bring them. They could be brought by the defense if they have something relevant.

[DEFENSE]: Same objection.

THE COURT: Overruled.

We hold that the State's comment here "was fair comment." *Mitchell*, 408 Md. at 389. Despite Mr. Lynn's claim that defense counsel's "single reference" to the State's subpoena power was to remind the jury that it was Mr. Lynn who brought Aunt to court to testify and not the State—to "further emphasiz[e] that this was a shoddy investigation" or a deliberate avoidance of the State to call witnesses who would not support their theory of the case—defense counsel did, indeed, comment on the State's subpoena power, thus opening the door for the State to respond. In doing so, the State's counsel made a single remark calling attention to Mr. Lynn's own subpoena power. We conclude the remark was sufficiently narrowly tailored to defense counsel's remark such that no impermissible burden shifting on the part of the State occurred as to this statement.

Finally, we address Mr. Lynn's remaining burden-shifting argument.[9] The defense, in closing argument, challenged the veracity of R.'s testimony:

> [DEFENSE]: I want you to think about the circumstances of [R.]'s disclosure, because remember, as the State said, it sort of started bubbling out of her. She couldn't resist the impulse anymore. Weeks before she told her Aunt [], weeks before she told her [M]other, before she told the school, she told you about a conversation she had with . . . a close friend who told [R.] that, curiously, she had a similar experience. Her grandfather had also sexually abused her.
>
> Now, I'm not saying that is what prompted all of this, but it's something to keep in mind. Think about the other silly, insignificant and sort of stupid untruths that, for no reason, like the fact . . . that when she told Ms. Diaz about this, she

[9] We are not persuaded by the State's argument that Mr. Lynn did not adequately brief this argument, as Mr. Lynn aptly notes that his "brief identified the portion of the State's closing argument that he contends constituted burden shifting, quoted it verbatim, and cited case law setting forth the State's burden of proof and the prohibition against burden-shifting." Accordingly, we shall address the merits of Mr. Lynn's argument.

> chose her because she felt comfortable with her, because she had given a school-wide presentation.
>
> * * *
>
> And I'm not saying, again, that this is proof that [R.]'s intentionally lying or maliciously lying, but just think about sort of the reason for that, and then think about how the important parts of this story have changed over time about the sexual abuse itself.

Mr. Lynn challenges the following response by the State's response on rebuttal:

> [STATE]: If you believe [R.], he is guilty. That's what it is. *The defense* has to try to convince you that she is lying for whatever reason, because that is the only way --
>
> [DEFENSE]: Objection.
>
> [STATE]: -- that he is not guilty.
>
> THE COURT: Overruled.

(Emphasis added.)

"Our first determination is whether any statements made by the prosecutor during [] rebuttal argument were improper." *Lee v. State*, 405 Md. 148, 165 (2008) (citation omitted). Here, the State's remarks to the jury that "[t]he defense has to try to convince you that [R.] is lying for whatever reason, because that is the only way . . . that [Mr. Lynn] is not guilty" were not improper because such comments were "limited in scope to the comments of defense counsel." *See Molina v. State*, 244 Md. App. 67, 176 (2019). The State "referenced [the defense's] closing argument specifically when commenting on the absence of evidence" rebutting R.'s testimony. *Id.* We read these comments as "discuss[ing] the nature, extent, and character of the evidence" by highlighting the "qualitative and quantitative significance" of R.'s testimony and her underlying

credibility. *Smith v. State*, 367 Md. 348, 354 (2001) (citations omitted). Our reading is supported by a later portion of the State's rebuttal closing argument:

> Defense counsel wants you to speculate . . . that there might be some reason and that therefore [Mr. Lynn] is not guilty. But that's not evidence. And what you've been instructed is that you are to apply the evidence to the law in this case. Speculation is very much not evidence. Arguments are not evidence. Everything I'm saying, everything defense counsel said, everything my co[-]counsel said, [is] not evidence. The evidence in this case, ladies and gentlemen, is that [R.] was sexually abused. We've talked through all of the reasons we know that she's not lying. And if she's not lying, she's telling the truth. And because she's telling the truth, this defendant did these things to her.

Nothing in the State's remarks "exceed[ed] the bounds of permissibly commenting on the absence of evidence by commenting, instead, 'directly on the defendant's failure to testify.'" *Molina*, 244 Md. App. at 175 (quoting *Smith*, 367 Md. at 360). Because the State's argument did not violate Mr. Lynn's constitutional rights, the circuit court was within its discretion to overrule his objection. *Molina*, 244 Md. App. at 176.

Nevertheless, "[e]ven if the prosecutor's remarks were improper, . . . an analysis of [the defendant's] 'burden-shifting' argument in context, as our case law requires, would also mandate the conclusion that the prosecutor's remarks in rebuttal argument could not have shifted the burden of proof." *Mitchell*, 408 Md. at 392-93 (citations omitted). Here, as in *Mitchell*, "the court carried out its function and instructed the jury as to the burden of proof." *Id.* at 393; *see also Harriston v. State*, 246 Md. App. 367, 381 (2020) (noting "this Court was persuaded simply by the trial court's provision of the burden instructions in holding that either burden-shifting had not occurred, or that if it did

occur it was corrected.") (citation omitted). The court specifically noted that "[t]he defendant is not required to prove his innocence[.]" "Maryland courts long 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) (citations omitted); *see also Jones-Harris v. State*, 179 Md. App. 72, 108 (2008) ("In light of this instruction, it is difficult to see how the jurors could have been misled into believing that [the defendant] was required to prove his innocence."). Similarly, "during . . . closing argument, defense counsel emphasized to the jury that it was the State's burden to prove the defendant's guilt." *Id.* In sum, even assuming the State's closing comments did amount to burden-shifting, we conclude that any burden-shifting was corrected by the court's actions. *Harriston*, 246 Md. App. at 381 (citation omitted).

CONCLUSION

For the above reasons, we hold that the circuit court did not err when it overruled Mr. Lynn's objections to the above-mentioned testimony and portions of the State's rebuttal closing argument.

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