Circuit Court for Montgomery County
Case No. 128117C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1925

September Term, 2017

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ALDERCY LUGO-DEFUENTES

v.

STATE OF MARYLAND

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Graeff,
Leahy,
Beachley,

JJ.

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Opinion by Graeff, J.

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Filed: March 13, 2020

On August 28, 2017, a jury sitting in the Circuit Court for Montgomery County convicted Aldercy Lugo-Defuentes, appellant, of four counts of second-degree child abuse. The court sentenced appellant to four, consecutive, ten-year terms of imprisonment, which resulted in an aggregate sentence of 40 years.

On appeal, appellant presents five questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err when it responded to a jury note by instructing the jury that the defense has the same ability as the State to call witnesses?

2. Did the circuit err in permitting the State to engage in several instances of impermissible closing argument?

3. Did the circuit court err in preventing the defense from engaging in permissible closing argument?

4. Did the circuit court err in denying appellant's request for particulars and in denying a related motion to dismiss on grounds of multiplicity?

5. Did the circuit court err in ordering separate sentences for each conviction of second-degree child abuse?

For reasons set forth below, we shall affirm the judgments of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

In January 2015, appellant married "J.I." Around that time, J.I. and his young daughter, D.B., began living with appellant, who cared for the child while J.I. was at work.

On August 26, 2015, a paramedic responded to appellant's residence after receiving a report of a young female who was unresponsive. Appellant advised that D.B., who at the time was four years old, had been injured in a fall. The paramedic examined D.B., who was very tired and had a bruise on the back of her head and a scrape on her forehead. D.B.

was transported to the hospital where an examination revealed that D.B. had suffered several injuries, including: rib fractures in various stages of healing; a grade four liver laceration, which caused blood to form in the abdomen; healing fractures in the pelvic area; at least one healing fracture of the lower back; swelling of the scalp; bruising along the ears; and significant bruising on the back and neck.

D.B.'s injuries were reported to the local authorities, and an investigation ensued. Initially, appellant told investigators that D.B.'s injuries were caused by various falls and accidents. In a follow-up interview, however, appellant admitted that she was "the one that hurt" D.B., and she had "started hitting" D.B. in or around July of 2015. Appellant also admitted that she had: (1) hit D.B. in her face and on the side of her head; (2) slapped D.B; (3) hit D.B. with a belt and a shoe; (4) pushed D.B. "hard" into a wall and into an elliptical machine, causing a back injury; and (5) had "squeezed" D.B. Investigators also interviewed D.B., who informed them that appellant had hit her with a belt and had "squished" and "squeezed" her stomach. Appellant subsequently was arrested.

**Trial Testimony and Evidence**

At trial, Dr. Eglal Shalaby-Rama, an expert in pediatric radiology, testified that she reviewed D.B.'s medical records and determined that D.B. had suffered 18 rib fractures, each of which was caused by a "crush-type injury" indicative of non-accidental trauma. Some of the rib fractures were in the acute stage and some were in the healing stage, which suggested that there were two incidents of injury to the ribs.[1] When asked whether all of

[1] Dr. Shalaby-Rama testified that an acute fracture was "under 10 days of age" and did not have "callus, or the healing part."

D.B.'s rib fractures could have been inflicted during the same event, Dr. Shalaby-Rama responded, "No." Dr. Shalaby-Rama testified that D.B. also had a "grade four liver laceration," which was caused by "severe direct trauma to the abdomen."[2]

Dr. Tanya Hinds, an expert in pediatrics with a specialty in child abuse, testified that she examined D.B. at the hospital on August 26, 2015. During that examination, she observed that, in addition to various abdominal injuries, D.B. was missing hair from her right scalp and had bruises "too numerous to count," on her right cheek, in front of her right ear, on her back, and on the back of her neck. Dr. Hinds concluded that D.B.'s injuries were "consistent with non-accidental trauma," and D.B.'s liver laceration was not "likely to be caused by being slapped with an open hand."

Photographs of D.B., which were taken at the hospital on August 26, 2015, were admitted into evidence. In those photographs, bruises and other marks can be seen on D.B.'s forehead, cheeks, chin, chest, torso, one arm, the back of her neck, ear, behind one ear, and all along her back.

D.B., who was six years old at the time of trial, testified that, when she was four years old, appellant pushed her down the stairs "more than one time." D.B. also testified that she "got hurt" after appellant put her foot on her stomach.

Laura Erstling, a child abuse investigator with the Montgomery County Department of Health and Human Services, testified that she was tasked with investigating D.B.'s injuries. On August 26, 2016, the same day that D.B. was taken to the hospital, she

[2] Dr. Shalaby-Rama testified that "there are five grades of liver injury, one being the mildest. Five is the most severe."

interviewed appellant. During that interview, appellant claimed that D.B.'s injuries had been caused by various accidents.

Later that day, Ms. Erstling observed a follow-up interview between the police and appellant. In that interview, which was recorded and played for the jury, appellant admitted that she had slapped D.B. in the face and in the ear. When the interviewing detective asked appellant about the injuries to D.B.'s ear, appellant stated that D.B. had made her mad because D.B. had hit one of appellant's daughters. The detective then asked appellant why she slapped D.B. in the face, and appellant stated that D.B. had "color[e]d the carpet." Appellant stated that both instances had occurred the previous week. She explained, moreover, that she had pushed D.B. forcefully into the walls and that, on the morning of August 25, 2016, she had pushed D.B. hard into an elliptical machine, causing D.B. to injure her back. When the detective asked appellant "what else happened in the morning," appellant responded, "That's all." And with respect to the various rib fractures, appellant stated that she "had pushed [D.B.] other times," and she had done so "during these past few days." Finally, appellant noted that, on one occasion weeks ago, D.B. had fallen down the stairs because appellant was rushing her.

Ms. Erstling testified that, during her investigation, she also interviewed D.B.'s father, J.I., who stated that, although he "may have hit [D.B.] with a belt the day before," he "was not responsible for those injuries." According to Ms. Erstling, J.I. also "denied that he had ever seen any injuries" to D.B.

Ms. Erstling later interviewed D.B. In that interview, which was recorded and played for the jury, D.B. told Ms. Erstling that appellant had hit her with a belt and that she

had "squished" and "squeezed" her stomach. D.B. also stated that J.I. had hit her "in the face and the tummy" with his open hand.

Appellant ultimately was convicted of four counts of second-degree child abuse: Count 3, between February 1, 2015, and August 12, 2015, causing fractures to D.B.'s ribs; Count 7, between February 1, 2015, and August 26, 2015, striking D.B.'s ear, causing bruising; Count 8, between February 1, 2015, and August 26, 2015, slapping D.B.'s face, causing bruising; and Count 9, on August 25, 2015, pushing D.B. into an elliptical machine, causing injury to D.B.'s back.

This appeal followed.

## DISCUSSION

### I.

Appellant contends that the circuit court erred in its response to a note submitted by the jury during deliberations. The note read: "Is [sic] the Defending attorneys not allowed to call witnesses? i.e. only the State gets to call witnesses?" The court shared the jury's note with the parties and proposed that it instruct the jury that "the defendant has no burden of proof and no obligation to call any witnesses. However, the defendant has the same opportunity as the State to call any witnesses she chooses."

Defense counsel objected, stating that he preferred that the court provide "no answer at all." He added that, as "a fallback position," the first sentence of the court's proposed instruction "would be appropriate." The court responded:

> THE COURT: It's a correct statement of the law, and the Court – a problem the Court has is somebody in there thinks that [appellant] was disadvantaged and that they couldn't call any witnesses. My job is to give

> them a fair understanding of the law without putting my finger on the scale, but to at least let them know what the law is. So, if they think only the State could call witnesses, which is kind of an absurd thought, but apparently somebody got that – but I think I'm going to add the – you got your objection noted. I'm going to add the burden of proof instruction and tell them to refer to that.

Ultimately, the court issued a handwritten response to the note, which stated: "The Defendant has no burden of proof and no obligation to call any witnesses. However, the Defendant has the same opportunity as t[he] State to call any witnesses she chooses. See MPJI-CR 2:02 – instructions on pg. 1 of instructions."[3]

Appellant contends that the court erred in giving this supplemental instruction to the jury because it "shifted the burden and diluted the reasonable doubt standard." She asserts that the court's supplemental instruction was unfairly prejudicial because the court "essentially permitted the jury to consider, as part of its deliberations, the fact that [a]ppellant did not testify and did not otherwise call any witnesses."

The State contends that the court properly exercised its discretion when it answered the question posed by the jury, asserting that its response served to clarify the confusion the jury had regarding appellant's ability to call witnesses. It argues that the court's response properly "toed the line" by referring to the State's burden of proof and the reasonable doubt standard. The State notes that neither the jury's note nor the court's response referenced appellant's testimony (or lack thereof), and it asserts that "nothing

[3] The reference to the instructions already given involved the pattern instruction on reasonable doubt and the presumption of innocence. *See Maryland Criminal Pattern Jury Instructions* ("MPJI-CR") 2:02.

about the court's response suggested that the jury could or should consider that appellant did not testify."

Maryland Rule 4-325(a), governing instructions to the jury, provides, in pertinent part: "The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate." A trial court's decision to "provide a supplemental instruction . . . is a [matter] within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion." *Jones v. State*, 240 Md. App. 26, 40 (2019).

"[A] trial court must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case." *State v. Baby*, 404 Md. 220, 263 (2008). When giving a supplemental instruction in response to a jury question, the court has a duty to answer the jury's question as directly as possible, and, in so doing, the court "must avoid giving answers that are 'ambiguous, misleading, or confusing.'" *Appraicio v. State*, 431 Md. 42, 51, 53 (2013) (quoting *Battle v. State*, 287 Md. 675, 685 (1980)).

Here, the circuit court did not abuse its discretion in providing the supplemental instruction. The jury's note asked whether the State alone was permitted to call witnesses. The court responded by clarifying that, although appellant had no burden of proof and no obligation to call any witnesses, she did have the same opportunity as the State to call witnesses. That response directly addressed the jury's question and was not ambiguous, misleading, or confusing.

Additionally, at no point did the court state, or even suggest, that the jury was permitted to consider the fact that appellant did not testify, and nothing about the court's response reasonably could be construed as a dilution of the State's burden of proof. Indeed, the court took precautions to avoid such an outcome by reiterating and reinforcing the instructions regarding the presumption of innocence, the State's burden of proof, and the reasonable doubt standard. In short, the court's response was a correct statement of the law, it was appropriately crafted to address the jury's question, and it was not ambiguous, misleading, or confusing. There was no abuse of discretion by the court in giving this response.[4]

**II.**

Appellant contends that the circuit court erroneously permitted the State to engage in three instances of "impermissible closing argument." The State disagrees.

It is well settled that attorneys are afforded "great leeway in presenting closing arguments to the jury." *Carroll v. State*, 240 Md. App. 629, 662 (quoting *Degren v. State*,

[4] *Brogden v. State*, 384 Md. 631 (2005), and *Gore v. State*, 309 Md. 203 (1987), upon which appellant relies, are inapposite. In *Brogden*, 384 Md. at 632, the defendant was charged with, among other things, carrying a handgun. The court responded to a jury's note, asking whether the State had the burden of proving that the defendant did not have a license to carry a handgun, by stating that the defendant, not the State, had the burden of proving the existence of a license. *Id.* at 639. Because there was no issue in the case regarding whether a handgun license existed, the Court of Appeals held that there was "absolutely no reason for the trial judge . . . to instruct the jury as to the law of handgun licenses and its effect on the burden of proof[.]" *Id.* at 639, 644. A similar issue is not presented here. In *Gore v. State*, 309 Md. 203 (1987), the Court of Appeals held that the circuit court's instruction that it had already determined that the evidence was legally sufficient, *id.* at 209, was erroneous because the issue of the sufficiency of the evidence was "within the exclusive province of the jury." *Id.* at 214. *Gore* is not analogous to the instruction given in this case.

352 Md. 400, 429 (1999)), *cert. denied*, 465 Md. 649 (2019). As the Court of Appeals has explained:

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

*State v. Gutierrez*, 446 Md. 221, 242 (2016) (quoting *Donaldson v. State*, 416 Md. 467, 488–89 (2010)).

Nevertheless, there are limitations upon the scope of a proper closing argument. "The prosecutor 'may strike hard blows, [but] he is not at liberty to strike foul ones.'" *Simpson v. State*, 442 Md. 446, 463 (2015) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). In this regard, the State may not vouch for the credibility of a witness, *Spain v. State*, 386 Md. 145, 153–54 (2005), "appeal to the prejudices or passions of the jurors," *Mitchell v. State*, 408 Md. 368, 381 (2009), or argue facts not in evidence or materially misrepresent the evidence introduced at trial, *Whack v. State*, 433 Md. 728, 748–49 (2013).

Even if a prosecutor's argument was improper, however, reversal is only required "where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Winston v. State*, 235 Md. App. 540, 573 (quoting *Spain*, 386 Md. at 158–59), *cert. denied*, 458 Md. 593 (2018). The "determination of whether the prosecutor's comments were prejudicial or

simply rhetorical flourish lies within the sound discretion of the trial court." *Degren*, 352 Md. at 431. "On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused." *Id*.

With that background in mind, we address the three instances of alleged impermissible comments in closing argument.

**A.**

The first instance occurred when the prosecutor, over objection, made the following arguments regarding appellant's pretrial statements to investigators:

> [D.B.] has bruises all over her face. [She] has that very unusual bruising on her ear, specific to child abuse. Did you ever use the belt on her more than once? Yeah, like four times. And when was the last time? Last week. Bruising all over her tiny body. **She admits to doing it. That right there, even if you didn't have [D.B.'s] testimony, is beyond a reasonable doubt.**
>
> * * *
>
> You'll see also in her statement that [appellant] admits to throwing [D.B.] against the wall. She admits to accidentally pushing her down the stairs. She admits to pushing [D.B.] against the elliptical machine, and that [D.B.] complained about her back after she threw her against that elliptical machine. **Even if [D.B.] hadn't spoken to Laura Ers[t]ling and told her what [appellant] did to her, even if [D.B.] hadn't come in here as a 6-year-old who had been horrible [sic] traumatized, [appellant's] statements are enough to convict her beyond a reasonable doubt.**

(Emphasis added.)

Appellant contends that the circuit court erred in allowing the State "to argue that [her] incriminating statements to police, standing alone, proved the State's case beyond a reasonable doubt." She argues that those comments were improper because "Maryland

case law makes clear that a conviction may not rest solely on an uncorroborated confession."

The State disagrees. It contends that the prosecutor did not suggest that appellant's confession was the only evidence against her, but rather, the prosecutor was emphasizing "the incriminating nature of [a]ppellant's statements—on which the jury, in *conjunction* with that other evidence, could base a conviction."[5]

We are persuaded that the prosecutor's comments regarding appellant's admission to the police that she abused D.B., taken as a whole, do not require reversal of appellant's convictions. The gist of the prosecutor's statements was that, because appellant admitted to the abuse, the State did not need D.B.'s testimony or her statements to Ms. Erstling in order to convict appellant beyond a reasonable doubt. The prosecutor made these comments after he had engaged in a lengthy discussion of the evidence presented to the jury, which included a discussion regarding: (1) the photographs of D.B. at the hospital; (2) Dr. Shalaby-Rama's and Dr. Hinds' testimony regarding the severity of and timing of D.B.'s various injuries; and (3) appellant's conflicting statements to police regarding how D.B.'s injuries had occurred. Under these circumstances, we cannot conclude that the circuit court abused its discretion in overruling the objection to those statements.

[5] The State notes that the prosecutor, after discussing Dr. Shalaby-Rama's testimony, stated: "And so the only conclusion is that that was child abuse, non-accidental trauma, and I don't think[ it's] in dispute. But we know that the defendant did this because of her own words, [D.B.]'s own words, and the corroboration of th[ese] words by what we see in [D.B.]'s body."

**B.**

The second instance involves the following comments during the State's rebuttal argument:

> [The police] looked at [appellant] when they spoke to her. She was wearing spaghetti straps and shorts. [The interviewing detective] looked at her body, considered, contemplated, maybe she's a victim of domestic violence, maybe that's why she's covering for [J.I.], and not – maybe that's why she's telling these absurd stories for how this girl got these catastrophic injuries.
>
> * * *
>
> This is an assumption that they made based on their life experiences, biases, desires to believe that a woman would not hurt a child. There is absolutely no evidence, none whatsoever, both on the body of [appellant] and in the medical records that [J.I.] abused in any way [appellant]. **That is smoke and mirrors used by the Defense to confuse you.**
>
> * * *
>
> [The interviewing detective] told you, again, the purpose of their statements, of the interviews of caregivers is to get a timeline, get an explanation for injuries, to get background information, to gather information, to discover whether or not, A, this is abuse, or who – and then who could possibly have committed this abuse.
>
> So, in her first . . . conversation with [appellant], look what she's doing, and you'll have that transcript. When did you meet [J.I.]? When did you start living together? What's your daily schedule? Things along those lines. It's not 45 minutes of [appellant] saying, I didn't do this. Okay? **I understand why [defense counsel] wants to manipulate the facts for you.**

(Emphasis added.)

Appellant contends that the circuit court abused its discretion in allowing the State to make those comments. She asserts that the comments were improper because they

"personally attacked defense counsel" and unfairly accused counsel of attempting to deceive the jury.

The State contends that the prosecutor's comments were not improper. It asserts that the comments were prompted by statements made by defense counsel during closing argument, which suggested that "(1) Detective Ratnofsky was lying and (2) the State had not called witnesses because they were damning to the State's case."

Initially, we agree with appellant that a prosecutor "may not impugn the ethics or professionalism of defense counsel in closing argument." *See Smith v. State*, 225 Md. App. 516, 529 (2015), *cert. denied*, 447 Md. 300 (2016). In *Smith*, however, we concluded that the State's reference to "smoke and mirrors" during rebuttal argument was not improper because it was "clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel." *Id.* at 529. *Accord Warren v. State*, 205 Md. App. 93, 138 (Prosecutor's references to defense counsel's arguments as "red herrings" were "well within the wide latitude granted to counsel in summation."), *cert. denied*, 427 Md. 611 (2012).

Here, the prosecutor's reference to defense counsel's use of "smoke and mirrors" and his attempt to "manipulate the facts" similarly were not improper because, in context, they did not amount to a personal attack on defense counsel. Rather, the comments, which were made during the State's rebuttal argument, were in direct response to arguments made by defense counsel during his closing argument.

The first comment, in which the prosecutor argued that any suggestion that J.I. had abused appellant and caused her to falsely confess was "smoke and mirrors used by the

[d]efense to confuse," came after defense counsel had argued that there was "a tremendous amount of evidence from [D.B.] that [J.I.] inflicted these injuries" and that there was "this huge cloud and veil over [appellant] that she's covering for him."

The second comment, in which the prosecutor stated that he understood "why [defense counsel] want[ed] to manipulate the facts for [the jury]," came after defense counsel insinuated that appellant had been coerced into confessing. Specifically, defense counsel commented on appellant's recorded interviews with investigators, noting that, in her initial interview, which lasted approximately 45 minutes, appellant had denied abusing D.B. Counsel then noted that, in appellant's follow-up interview, in which she ultimately admitted to the abuse, the first 10 minutes of the interview were missing from the recording. Finally, counsel argued that the officer's explanation as to why that portion of the interview was missing was "a lie."[6]

When read in context, nothing about the prosecutor's comment suggests that it was intended as a personal attack against defense counsel. Instead, the prosecutor was challenging defense counsel's argument, stating that he understood why defense counsel would want to manipulate the facts to suggest that appellant's statements to police had been coerced. *See Warren*, 205 Md. App. at 139 (Prosecutor's use of the word "idiot" when referring to defense counsel's argument was not improper where the record showed that

[6] On cross-examination, the interviewing detective testified that she thought she had started recording at the beginning of the interview. She stated that she did not know how or why the recording started when it did.

the prosecutor sought to rebut counsel's argument, "rather than argue that appellant's counsel was an 'idiot.'").

Under the circumstances here, we cannot say that the circuit court abused its discretion in permitting the prosecutor's comments. Nor can we conclude that the comments were likely to have misled the jury to the prejudice of appellant. *See Beads v State*, 422 Md. 1, 4, 8, 11 (2011) (Prosecutor's inappropriate comment that "Defense's specific role" was "to get their Defendants off" was "unlikely to have misled or influenced the jury to the prejudice of the accused."). Appellant is entitled to no relief on this claim.

**C.**

The third instance occurred when the prosecutor, during the State's rebuttal argument, stated:

> [D.B. is] told she has broken bones, and she knows her dad hit her, but she's not a doctor. She doesn't know what caused her broken bones. But the doctors do, and the doctors told you it wasn't an open-handed slap. So, while it's unfortunate that [D.B.'s] dad may have hit her, **we know to a degree of scientific certainty that the open-handed slaps inflicted by her dad did not, I repeat, did not cause the catastrophic injuries that [D.B.] suffered.** What the doctors did tell you, however, was that her catastrophic injuries could have been caused by somebody stepping on her stomach.
>
> [Defense Counsel]: Objection.
>
> THE COURT: Overruled.
>
> [Prosecutor]: That her pelvic injuries could have been caused by somebody stepping on her foot, on her pelvis, while she laid, as she said, dead on the floor.

(Emphasis added.)

Appellant challenges the State's argument that, "to a degree of scientific certainty," open-handed slaps were not the cause of D.B.'s serious injuries. She asserts that this argument "impermissibly argued facts not in evidence" because "no State's expert provided such testimony."

The State contends that this contention is not preserved for appellate review because counsel did not "object right after that comment," and at the time counsel did object, the State had moved on to assert that the medical testimony established what could have caused the injuries, stepping on D.B. In any event, the State contends that the prosecutor's comment was not improper because the State's expert, Dr. Hinds, had testified that D.B.'s injuries were unlikely to have been caused by an open-handed slap.

We agree with the State that appellant's objection to the prosecutor's comment that "we know to a degree of scientific certainty" that open-handed slaps did not cause D.B.'s catastrophic injuries was not preserved for appellate review. Here, based on the timing of the objection, and the failure to clarify that the objection was to a prior statement, the issue was not properly presented to the circuit court, and it is not preserved for this Court's review. *See Shelton v. State*, 207 Md. App. 363, 383–85 (2012) (defendant failed to preserve his claim that State made an improper comment during closing argument where the defendant did not object immediately after the comment was made but rather objected to a different comment that was made shortly thereafter). *See also Purohit v. State*, 99 Md. App. 566, 586 (The defendant failed to preserve his claim that the State made an improper comment during closing argument "because counsel failed to object to [that] portion of the State's closing argument."), *cert. denied*, 335 Md. 698 (1994).

## III.

Appellant contends that the circuit court erred in preventing defense counsel from making permissible closing argument. Specifically, she asserts that the court erroneously sustained the State's objection "when defense counsel argued (1) that [J.I.] admitted that he struck D.B. with a belt and (2) that [J.I.]'s statement that he did not see any injuries on D.B should have given authorities pause."

During his closing argument, defense counsel noted that the initial theory of the police was that J.I. had abused D.B., and appellant was lying to protect him. Defense counsel argued that the theory was "confusing" because appellant had "[taken] the blame for everything" and told the police that J.I. "didn't do anything, even though [J.I.] himself admits to striking the child with the belt." The State objected to that comment, and the court sustained the objection. Defense counsel then stated that Ms. Erstling testified that her interview with J.I. "led to no information," continuing that "[D.B.] is bruised and battered from head to toe. And so, you're not going to suspect a father who says, I didn't see any injuries?" The State objected, stating that defense counsel was "reciting as fact things that are not in evidence." The following colloquy ensued:

THE COURT: What was the last comment?

[DEFENSE COUNSEL]: [J.I.'s] lack of knowledge.

[PROSECUTOR]: Something that [J.I.] didn't do.

THE COURT: All right. Sustained. It's not in evidence.

[DEFENSE COUNSEL]: I think the detective testified.

THE COURT: It's not. I don't want to argue with you[.]

Appellant contends that the court erred in sustaining the State's objections because defense counsel's arguments were based on the evidence, i.e., the testimony of Laura Erstling, who testified that J.I. had told investigators that he had struck D.B. with a belt and that he had not seen any injuries on D.B. The State contends that the court "properly exercised its discretion in prohibiting defense counsel from arguing facts not in evidence." It asserts that the way the argument was made "mischaracterized the evidence," and instead of referencing what Ms. Erstling testified that J.I. had said, counsel suggested that J.I. had testified.

The Sixth Amendment right to counsel "entails the opportunity to present closing argument." *Washington v. State*, 180 Md. App. 458, 471 (2008). "The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor[.]" *Id.* (quoting *Yopps v. State*, 228 Md. 204, 207 (1962). The United States Supreme Court has explained the importance of closing arguments as follows:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

*Herring v. New York*, 422 U.S. 853, 862 (1975).

During closing argument, counsel is permitted to "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in

evidence[.]" *Smith v. State*, 388 Md. 468, 488 (2005) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). On the other hand, counsel is not permitted to use facts that are not in evidence or "comments 'that invite the jury to draw inferences from information that was not admitted at trial are improper.'" *Donati v. State*, 215 Md. App. 686, 731 (quoting *Lee v. State*, 405 Md. 148, 166 (2008)), *cert. denied*, 438 Md. 143 (2014). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith*, 388 Md. at 488.

"The determination and scope of closing argument is within the sound discretion of the trial court," and therefore, "an appellate court should not interfere with that judgment unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party." *Donati*, 215 Md. App. at 731 (quoting *Washington*, 180 Md. App. at 473 (2008)) (cleaned up).

Here, the trial court abused its discretion by sustaining the prosecution's objections to the defense's comments regarding J.I. because both statements reflected evidence that had been introduced at trial by Ms. Erstling. First, she testified that J.I. stated in an interview that "he may have hit her with a belt the day before, but not hard." Second, Ms. Erstling testified that, in that same interview, J.I. had stated that "he had no knowledge that she had any injuries" and "denied that he had ever seen any injuries." Both of these statements came into evidence without objection, and therefore, were available for use in closing arguments by defense counsel. *Smith*, 388 Md. at 488. We also reject the State's argument that counsel's comments in closing argument made it seem as if J.I. had testified

because the jury would have been aware that he did not. Moreover, defense counsel noted the fact that J.I. did not testify at two other times in his closing argument.

That conclusion, however, does not end the analysis. When the trial court abuses its discretion, reversal is required unless the court's error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332 (2008) (cleaned up). Accordingly, "[w]e must determine, upon our 'own independent review of the record,' whether we are 'able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Donaldson v. State*, 416 Md. 467, 496 (2010) (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). *Accord Dorsey v. State*, 276 Md. 638, 659 (1976).

Appellant argues that the two sustained objections "unfairly blunted the defense and might very well have dissuaded the jury from acquitting [a]ppellant of even more counts." We disagree. Defense counsel made numerous other factual references during closing argument to support appellant's theory that J.I. had caused D.B.'s more serious injuries and that the police should have investigated him further, including that D.B. said that J.I. had previously hit her. Indeed, this alternative theory was the crux of the entire closing argument. Accordingly, we hold that the trial court's limitation of the defense's argument on these two minor instances was harmless error.

**IV.**

Appellant's next contention is that the circuit court erred in denying her pretrial request for additional particulars and in denying her motion to dismiss the charges on grounds of multiplicity. She asserts that "[t]he unit of prosecution for physical child abuse

is each abusive transaction," and where one abusive incident involves multiple acts, a "defendant may not be prosecuted and punish[ed] separately for each act." Appellant argues that, where the indictment alleged different acts "on or about and between February 1, 2015 through August 12, 2015," the court "erred in ruling that the State did not need to provide any more particulars in order to inform the defense whether any of the acts alleged in Counts, 3, 7, 8, and 9 occurred during the same incident." Moreover, she argues that, "because the State was never required to disclose whether the alleged acts occurred during the same or different incidents, it is impossible to determine whether the jury's verdict violated the rule against multiplicity."

The State contends that the court properly denied appellant's request for additional particulars because "appellant wanted exact dates for each incident, but the State could not provide them, given that the abuse was discovered at a late date and that D.B. was too young to provide time frames or details."[7] As to the court's denial of appellant's motion to dismiss, the State argues that the court did not err because the indictment "properly charged separate injuries in each count," and the State's theory, including appellant's statements, was that the injuries were caused by separate events.

## A.

## Proceedings Below

[7] The State also argues, in the alternative, that appellant's claim is not preserved for this Court's review because she never requested a bill of particulars as to whether the criminal acts occurred during the same or different incidents. We disagree. The record shows that defense counsel raised that argument at the hearing on the request for particulars and the motion to dismiss.

Appellant was indicted on nine counts related to her abuse of D.B. The convictions at issue here are Counts 3, 7, 8, and 9. These counts alleged that appellant, "on or about and between February 1, 2015 and August 12, 2015, . . . did . . . cause abuse to D.B., *to wit:* [Count 3,] *did cause fractures to D.B.'s ribs*, in violation of Section 3-601(d) of the Criminal Law Article";[8] Count 7, "on or about and between February, 1, 2015, and August 26, 2015, . . . did . . . cause abuse to D.B., *to wit: did strike D.B.'s ear, causing bruising*, in violation of Section 3-601(d) of the Criminal Law Article"; Count 8, "on or about and between February, 1, 2015, and August 26, 2015, . . . did . . . cause abuse to D.B., *to wit: did slap D.B.'s face, causing bruising*, in violation of Section 3-601(d) of the Criminal Law Article"; Count 9, "on or about and August 25, 2015, . . . did . . . cause abuse to D.B., *to wit: did push D.B. into an elliptical, causing injury to her back*, in violation of Section 3-601(d) of the Criminal Law Article[.]"

Prior to trial, appellant filed a demand for particulars as to those counts.[9] Specifically, appellant sought additional information regarding, among other things, the exact dates on which the crimes occurred, approximate dates if exact dates were unknown, and the facts the State intended to elicit to show that D.B. had suffered the injuries alleged and that appellant had caused those injuries. Appellant also filed a motion to dismiss,

[8] The indictment originally specified that the injury was to D.B.'s "right ribs," but it was later amended to state that the injury was to D.B.'s "ribs."

[9] Appellant's demand for particulars also included requests related to other charges that are not pertinent to this appeal.

arguing that the counts were multiplicative because they charged the same offense based upon the same factual scenario.

On November 22, 2016, the court held a hearing on appellant's motions. Defense counsel asserted, with respect to the demand for particulars, that he had concerns about the "unit of prosecution in terms of when [D.B.'s] injuries occurred," and he did not know, based on the indictment, whether the injuries happened "all at the same time" or "separately." Defense counsel also argued that the date ranges in the indictment were too "wide," noting that they did not indicate whether the crimes happened "at the same time, the same date, [or] different dates within that." The State responded that it did not know "the exact date that each of these events occurred" because the only two witnesses to the crimes—D.B. and appellant—provided only a general time frame in which the crimes occurred, and pursuant to *State v. Mulkey*, 316 Md. 475 (1989), it was not required to give exact dates for abuse of a child. Ultimately, the court denied appellant's demand for particulars, finding that appellant was "on notice of what she did," and the "broader time ranges" contained in the counts was "the best they can do given what the alleged victim can remember."

As to the motion to dismiss, defense counsel argued that the charges were multiplicative because they charged "a number of events that occurred on or about the same date and time and that are similar in nature." Defense counsel further argued that, if convicted, appellant could "receive multiple sentences for a single offense." The State responded that, although the counts were "virtually identical and contain the same time period," the counts were not multiplicative because they specifically indicate that "each of

[D.B.'s] injuries [were] caused by different acts." The court ultimately agreed with the State and denied appellant's motion, finding that the counts were not multiplicative because they alleged "separate injuries albeit over one long time span."

**B.**

**Analysis**

**1.**

**Request for Particulars**

"It is a well-settled principle of criminal law that the purpose of an indictment is 'to inform the defendant of the charge against him in order that he may prepare his defense and may also protect himself against subsequent prosecution for the same offense.'" *Dzikowski v. State*, 436 Md. 430, 444 (2013) (quoting *Seidman v. State*, 230 Md. 305, 312 (1962), *cert. denied*, 374 U.S. 807 (1963)). Accordingly, an indictment must

> characterize the crime . . . and . . . provide such description of the criminal act alleged to have been committed as will inform the accused of the specific conduct with which he is charged, thereby enabling him to defend against the accusation and avoid a second prosecution for the same criminal offense.

*State v. Ferguson*, 218 Md. App. 670, 679 (2014) (quoting *Williams v. State*, 302 Md. 787, 791 (1985)). "Maryland Rule 4-202(a), in implementation of these requirements, thus, requires that a charging document 'contain a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred.'" *Dzikowski*, 436 Md. at 445 (quoting Rule 2-402(a)). Beyond that, additional information, such as the "manner or means of committing

the offense, if not otherwise provided by the prosecutor, is obtainable through a bill of particulars." *Id.* at 446.

A bill of particulars "is 'a formal written statement by the prosecutor providing details of the charges against the defendant.'" *Id.* (quoting Charles Alan Wright et al., *Fed. Prac. & Proc. Crim.* § 130 (4th ed. April 2012 Update). Its purpose is to "'give the defendant notice of the essential facts supporting the crimes alleged in the indictment or information, and also to avoid prejudicial surprise to the defense at trial.'" *Id.* (quoting Wright, *supra*). The bill of particulars is a limit on the "factual scope of the charge, rather than its legal scope." *Id.* at 447. "It is not to be used as an instrument to require the State to "elect a theory upon which it intends to proceed," but rather "is a privilege allowed to the accused where the indictment is so general that it fails to disclose information sufficient to afford him a fair and reasonable opportunity to meet it and defend himself." *Id.* at 447–48 (citations and quotation marks omitted). Maryland appellate courts "will not reverse a denial of particulars unless there has been a gross abuse of discretion resulting in injury to the accused." *Veney v. State*, 251 Md. 159, 163 (1968), *cert. denied*, 394 U.S. 948 (1969).

Here, the circuit court did not abuse its discretion in denying appellant's request for a bill of particulars. Each charge set forth a factual situation upon which the charge was based and provided a general time frame during which each act occurred. Although an exact date for each offense was not provided, such specificity was not required under the circumstances. *Mulkey*, 316 Md. at 482–88 (The "exact date of the offense" was not an "essential element" in an indictment that alleged multiple counts of child abuse.). Indeed, the circuit court noted that such specificity was not possible in this case because the only

known witnesses to the abuse—appellant and D.B., who was four years old at the time of the abuse—provided only a general time frame for when the abuse occurred.

Appellant argues that the court erred in ruling that the State did not need to provide more particulars to inform her whether the acts alleged in Counts 3, 7, 8, and 9 occurred during the same incident.[10] Appellant, however, cites no case law to support the proposition that an indictment is lacking in particularity when there is overlap in the times that discrete counts occurred, or that a court abuses its discretion in refusing a request for additional particulars under circumstances similar to those presented here.

Here, the record makes clear that, in charging appellant with four counts of second-degree child abuse based on distinct acts and distinct harms, the State was alleging that appellant had committed four separate incidents of child abuse over a specific time frame. Appellant was adequately informed of the charges against her such that she was able to prepare her defense. Accordingly, the court did not abuse its discretion in denying appellant's request for particulars.

**2.**

**Motion to Dismiss on Grounds of Multiplicity**

"Multiplicity is the charging of the same offense in more than one count." *Montgomery v. State*, 206 Md. App. 357, 398 (quoting *Brown v. State*, 311 Md. 426, 432 n.5 (1988)), *cert. denied*, 429 Md. 83 (2012). "Whether a particular course of conduct constitutes one or more violations of a single statutory offense affects an accused in three

[10] Appellant acknowledges that Count 9, which alleged that she pushed D.B. into an elliptical machine on or about August 26, 2015, charged a separate incident.

distinct, albeit related ways: multiplicity in the indictment or information, multiple convictions for the same offense, and multiple sentences for the same offense." *Montgomery*, 206 Md. App. at 400–01 (quoting *Brown*, 311 Md. at 432).

Ordinarily, '"[t]he dismissal of an indictment is at the sound discretion of the trial court,' [and] we review for an abuse of discretion." *Elliott v. State*, 185 Md. App. 692, 731 (2009) (quoting *State v. Lee*, 178 Md. App. 478, 484 (2008)). On the other hand, when the court's decision turns on the interpretation and application of a Maryland statute, we must determine whether the court's decision was legally correct, which we do *de novo*. *Hackney v. State*, 459 Md. 108, 114 (2018).

"When a criminal defendant challenges 'multiple indictments, multiple convictions, or multiple sentences, the unit of prosecution reflected in the statute controls whether multiple sentences ultimately may be imposed.'" *Handy v. State*, 175 Md. App. 538, 576 (quoting *Moore v. State*, 163 Md. App. 305, 320 (2005)), *cert. denied*, 402 Md. 353 (2007). "The unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence." *Id.* at 576 (quoting *Brown*, 311 Md. at 434).

At issue here is Md. Code (2012 Repl. Vol.) § 3-601 of the Criminal Law Article ("CR"), which proscribes second-degree child abuse and states, in relevant part, that "[a] parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause abuse to the minor." CR § 3-601(d)(1)(i). The statute defines "abuse" as "physical injury sustained by a minor as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that

the minor's health or welfare is harmed or threatened by the treatment or act." CR § 3-601(a)(2).

As noted, appellant argues that the "unit of prosecution" for second-degree child abuse is the act of abuse itself. She claims that the indictment was multiplicitous because "if some or all of the acts alleged in the second-degree child abuse counts occurred at the same time, those counts could not be prosecuted and punished separately."

The State, on the other hand, argues that the unit of prosecution is not the act of abuse but rather the injury to the child. Consequently, because it alleged separate injuries, the indictment was not multiplicitous because each count alleged a separate injury.

We need not address the merits of the unit of prosecution argument because, as the State correctly notes, appellant's case "never was about a single assaultive act." In other words, the question as to whether "multiple acts that occur during the same transaction/episode may be punished separately" is immaterial because, as the record makes plain, appellant was not charged with committing multiple acts during the same "episode." Rather, appellant was charged with committing four separate acts of second-degree child abuse, which resulted in four separate injuries, over an extended period. The State never maintained that the acts of child abuse occurred during the same incident, and appellant's statements to the police did not suggest otherwise.

This Court's decision in *Malee v. State*, 147 Md. App. 320, *cert. denied*, 372 Md. 431 (2002), is instructive. There, the defendant was charged with, among other things, six counts of sexual offense, all of which were "verbatim clones of each other," in that they each charged the defendant with having committed the same act (anal intercourse) against

the same child over the same time period. *Id.* at 326–27. Following his conviction on each of those charges, the defendant noted an appeal, and argued that the indictment was defective for lack of specificity as to the time that each "act" of sexual abuse occurred. This Court disagreed, explaining that specificity as to the exact date and time of any one of the offenses was not required because it is sometimes impossible to make that determination, "particularly with respect to offenses on minors[.]" *Id.* at 327–28. We then explained that this latitude extended to the dating of the six sexual offenses against the defendant:

> Thus, if the proof were that a single act of anal intercourse had occurred between "January 1, 1996 through June 30, 1996," the allegation as to the time of the offense would be adequate. If the proof further established that anal intercourse had occurred twice during that same time period, . . . two separate counts would be required. The allegation as to the time period within which the second offense occurred would, of necessity, be precisely the same as in the case of the first such offense. If within that same embracing time period, the proof were to cause us to multiply the offense by six rather than by two, the allegations as to the time period within which the offenses occurred would remain identical. The outer limits of the time period are the same whether within that time period the offense occurred once or twice or fifty times. The multiplier is simply a function of the proof and does not alter the required specificity of the dating in the indictment.

*Id.* at 328–29.

Here, the State charged appellant with four counts of second-degree child abuse over the same general time frame because, similar to *Malee*, that is what the evidence established. That is, the counts of child abuse were "multiplied" because the State was alleging that appellant had committed four separate and distinct acts of second-degree child abuse. At no time did the State allege that appellant's acts of child abuse were part of a

single scheme or course of conduct. Under these circumstances, the State was not required to provide greater specificity as to the time that each act of child abuse occurred.

To the extent that there was any ambiguity as to whether the four acts of child abuse occurred during one or more episodes, it was resolved by the evidence at trial. *See Kelley v. State*, 402 Md. 745, 756–57 (2008) (noting that, in the context of multiple theft charges, "the determination of whether multiple takings were part of a single scheme or course of conduct . . . is a factual matter that must be based on evidence"). The evidence showed that the incidents in each count were separate and not based on one event. Dr. Shalaby-Rama testified that D.B.'s fractured ribs were caused by a "crush-type injury," and because the fractures were in different stages of healing, they could not have been inflicted during the same event. D.B. testified that she "got hurt" after appellant "put her foot on [her] stomach." And appellant, when asked by investigators about D.B.'s rib fractures during the August 26, 2016, interview, stated that, within "these past few days," she had pushed D.B. into walls on multiple occasions. Regarding bruising on D.B.'s face and ear, appellant admitted that she "started hitting" D.B. in or around July of 2015. She stated that she slapped D.B. in the face because she "color[ed] the carpet," and she hit D.B. in the ear because D.B. hit appellant's daughter.

Regarding the charge that appellant pushed D.B. into an elliptical machine, injuring D.B.'s back, appellant told investigators that, on the morning of August 25, 2016, she had pushed D.B. "hard" into an elliptical machine, causing D.B. to injure her back. When the detective asked appellant "what else" happened that morning, appellant responded: "That's all."

Based on this evidence, it is clear that appellant committed separate acts of second-degree child abuse that caused four separate injuries. Accordingly, those charges were not multiplicitous, and the circuit court did not err in denying appellant's motion to dismiss on that ground.

**V.**

Appellant's final argument is that the circuit court erred in imposing separate sentences for each of her convictions of second-degree child abuse. As with her prior argument regarding multiplicity, appellant maintains that the record is ambiguous as to whether the jury convicted her of different charges based on the same act.

We disagree. As discussed in greater detail *supra*, appellant was charged with four separate counts of second-degree child abuse based on four separate acts, and evidence was presented at trial establishing that each of the acts occurred during separate incidents, albeit over the same general time span. Because the State proved separate acts for each count, the circuit court properly imposed separate sentences. *See Latray v. State*, 221 Md. App. 544, 562 (2015) ("[S]eparate acts resulting in distinct harms may be charged and punished separately.").

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